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Supreme Court, U.S.
FILED
071370 APR 25 2008
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

LONG JOHN SILVER'S, INC.,

Petitioner,

v.

ERIN COLE, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

PETER J. GREGORA
LAURA W. BRILL
Irell & Manella LLP
1800 Avenue of the Stars
Los Angeles, CA 90067
(310) 277-1010

HENRY L. PARR, JR.
DAVID H. KOYSZA
Wyche, Burgess, Freeman and Parham, P.A.
Post Office Box 728
Greenville, SC 29602
(864) 242-8200

DAN HIMMELFARB
Counsel of Record
ROBERT P. DAVIS
TAMARA S. KILLION
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

In *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court held that federal statutory claims were arbitrable because "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute." *McMahon*, 482 U.S. at 232; *Gilmer*, 500 U.S. at 32 n.4. Since then, the Second, Fourth and Eleventh Circuits have held that a federal court must confirm an arbitral award that misinterprets a federal statute unless the arbitrator intentionally misinterpreted the statute. In contrast, the District of Columbia and Fifth Circuits have held that such an award must be vacated if, regardless of the arbitrator's willfulness, the error in interpreting the statute materially affects a party's substantive rights.

The question presented in this case is what degree of "judicial scrutiny . . . is sufficient to ensure that arbitrators comply with the requirements of the statute."

RULE 14.1(b) STATEMENT

Petitioner is Long John Silver's, Inc. Long John Silver's Restaurants, Inc. was listed as an appellant in the court of appeals, but that corporation has merged into Long John Silver's, Inc. and no longer exists. Respondents are Erin Cole, Nick Kaufman and Victoria McWhorter.

RULE 29.6 STATEMENT

Petitioner Long John Silver's, Inc. is a wholly owned subsidiary of Yum! Brands, Inc. Yum! Brands, Inc. is a publicly held company. No publicly held company owns 10% or more of the stock of Yum! Brands, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Long John Silver's, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix Submitted Herewith ("App.") 1a-16a) is reported at 514 F.3d 345. The opinion of the district court (App. 17a-28a) is reported at 409 F. Supp. 2d 682.

JURISDICTION

The court of appeals issued its opinion on January 28, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), provides, in pertinent part, as follows:

> Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situ-

> ated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

Rules 1-6 of the American Arbitration Association's Supplementary Rules for Class Arbitrations (Oct. 8, 2003) are reproduced at App. 50a-57a.

STATEMENT OF THE CASE

The present case presents an important issue regarding the review of arbitrators' interpretation and application of federal statutes. The circuits have split on this question, with the District of Columbia Circuit and the Fifth Circuit holding that a court reviewing an arbitral decision under a federal statute must ensure that the arbitrator has correctly interpreted and applied the statute, while the Fourth Circuit (in this case), the Second Circuit and Eleventh Circuit have held that courts must confirm an arbitral decision applying a federal statute – regardless of errors in interpretation or application of the statute – so long as the arbitrator's errors were not willful.

In *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court held that federal statutory claims were arbitrable. The Court explained that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *McMahon*, 482 U.S. at 229-230 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); *Gilmer*,

500 U.S. at 26 (same). The Court emphasized that "although judicial scrutiny of arbitration awards necessarily is limited, *such review is sufficient to ensure that arbitrators comply with the requirements of the statute.*" *McMahon*, 482 U.S. at 232 (emphasis added); *Gilmer*, 500 U.S. at 32 n.4 (same).

Despite this Court's clear statements in *McMahon* and *Gilmer*, several circuits (including the Fourth Circuit in this case) apply a standard of review that explicitly permits arbitral noncompliance with statutory requirements – they will not vacate an erroneous arbitral interpretation of a federal statute unless the aggrieved party can demonstrate that the arbitrator willfully misapplied the statute. In the Fourth Circuit's words, a reviewing court is entitled to "determine only whether the arbitrator did his job – not whether he did it well, correctly, or reasonably." App. 7a. By contrast, the District of Columbia Circuit and the Fifth Circuit have relied upon *McMahon* and *Gilmer* to hold that courts reviewing arbitral decisions applying a federal statute must ensure that the arbitrator has correctly interpreted and applied the statute. *See Cole v. Burns International Security Services*, 105 F.3d 1465, 1487 (D.C. Cir. 1997) (standard of review must be "sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law"); *Williams v. Cigna Financial Advisors Inc.*, 197 F.3d 752, 761 (5th Cir. 1999) ("The federal district courts and courts of appeals are charged with the obligation to exercise sufficient judicial scrutiny to ensure that arbitrators comply with their duties and the requirements of the statutes.").

In this case, the arbitrator clearly misinterpreted the Fair Labor Standards Act. However, the court of

appeals never reached that issue because it applied a standard of review it characterized as "among the narrowest known to the law." App. 7a. Under the standard applied by the court of appeals, the court must affirm an erroneous statutory interpretation unless the aggrieved party can demonstrate that the arbitrator *intentionally* misinterpreted the law.

The Fourth Circuit's decision in this case violates the requirements of *McMahon* and *Gilmer*, undermines the fundamental basis upon which this Court held that federal statutory claims were arbitrable, and exacerbates an already serious circuit split regarding the appropriate standard of review for arbitral decisions interpreting federal statutes.

A. Respondents Institute A Class Arbitration Under The FLSA.

The named Respondents are former managers of restaurants owned by Petitioner. In December 2003, Respondents instituted an arbitration proceeding against Petitioner before the American Arbitration Association (the "AAA"), asserting claims for overtime compensation under the Fair Labor Standards Act (the "FLSA"), 29 U.S.C. §§ 201 *et seq.* The arbitration proceeding was instituted pursuant to arbitration agreements between Petitioner and Respondents providing that claims involving Respondents' employment would be resolved by arbitration before the AAA. *See* Joint Appendix Filed with the Court of Appeals ("JA") 84. The arbitration agreements further specified that the arbitrator would "apply the substantive law (and the law of remedies, if applicable) in the state in which the claim arose, or federal law, or both, depending on the claims asserted" (JA 84) and that the arbitrator may award "anything

[the employee] might seek through a court of law" (JA 81).

In their arbitration complaint, Respondents purported to act on behalf of all "similarly situated" employees pursuant to § 16(b) of the FLSA. JA 186. Section 16(b) permits a collective action in which FLSA plaintiffs may proceed on behalf of similarly situated employees – but only those employees who expressly consent in writing to join the action:

> [An action to enforce rights under the FLSA] may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. *No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.*

29 U.S.C. § 216(b) (emphasis added). Respondents asked the arbitrator to authorize the arbitration to proceed as a collective action pursuant to § 16(b). JA 188.

More than a year later, Respondents abandoned their request for a collective action under FLSA § 16(b). Instead, they asserted that compliance with the written consent mandate of § 16(b) was unnecessary, and sought class certification under the AAA Supplementary Rules for Class Arbitrations. JA 107-108.

B. The Arbitrator Certifies An "Opt Out" Class And Refuses To Apply The Written Consent Requirement Of FLSA § 16(b).

On September 19, 2005, the arbitrator issued a Class Determination Award. App. 29a-49a. In that award, the arbitrator concluded that the written consent mandate of FLSA § 16(b) was inapplicable in arbitration and instead certified an "opt out" class pursuant to the AAA class arbitration rules. *Id.* at 35a. Under the arbitrator's ruling, all persons within the arbitrator's class definition are deemed to be class members (and bound by the results of the arbitration) unless they affirmatively request exclusion from the class. Such an "opt out" class has been uniformly recognized as "irreconcilable" with the written consent requirement of FLSA § 16(b). *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir. 1975); *see Cameron-Grant v. Maxim Healthcare Services, Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003) (An FLSA collective action under § 16(b) is "a fundamentally different creature than the Rule 23 class action."); *Dolan v. Project Constr. Corp.*, 725 F.2d 1263, 1267 (10th Cir. 1984) ("The policies behind the [29 U.S.C.] § 216(b) action are almost diametrically opposed to those involved in a Rule 23 . . . action.").

Nonetheless, the arbitrator concluded that the written consent requirement of § 16(b) applied only in court proceedings – not in arbitration – because, he asserted, there "is no evidence of any congressional intent which would impose an opt-in provision upon a class action being privately arbitrated." App. 34a. Characterizing the written consent requirement of § 16(b) as merely "procedural," the arbitrator held that, solely by agreeing to arbitration, the par-

ties (including the absent class members) had surrendered their rights under § 16(b) and somehow "incorporated" the AAA class arbitration rules "into the parties' employment agreement" (App. 35a) – although the agreements make no reference to the class rules, which did not even exist when the agreements were entered into.[1] The arbitrator explained his reasoning as follows:

> Having succeeded in accomplishing a private litigation unmoored from federal procedural rules, the claim for a necessary adherence to the FLSA procedural rules is unpersuasive. Indeed, the judicial preference for the opt-out procedure is so universal that absent compelling authority requiring adherence to the opt-in procedure, there would be no inclination whatsoever to engraft that procedure upon a private arbitration. No such compelling authority has been presented.

App. 34a.

The arbitrator further concluded that the "opt out" structure he adopted was preferable to what he characterized as the "disfavored" written consent requirement – the requirement that Congress explicitly mandated in the FLSA – because the arbitrator's

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[1] The AAA class arbitration rules were adopted in October 2003, only two months before Respondents filed their arbitration complaint and years after the arbitration agreements were entered into. In general, the rules utilize standards similar to those specified in Rule 23 of the Federal Rules of Civil Procedure. The AAA class arbitration rules may be found at http://www.adr.org/sp.asp?id=21936, and Rules 1-6 are reproduced at App. 50a-57a. The arbitration agreements referenced the AAA's commercial arbitration rules. JA 84.

chosen method would, in his view, further the purposes of the FLSA by certifying a larger class:

> If fairness, efficiency and due process applicable to the widest appropriate class be the criteria for determination, then the Supplementary Rules as incorporated into the parties' employment agreement must prevail over the disfavored opt-in provisions espoused by Defendants. The salutary objective of the FLSA [is] advanced by the opt-out procedure.

App. 35a.

The arbitrator thus determined that – contrary to Congress's determination – the objectives of the FLSA would be better served by "opt out" class actions than by the "disfavored" written consent requirement that Congress enacted into law.

C. The District Court Upholds The Arbitrator's Ruling Without Deciding Whether It Violated The FLSA.

Petitioner timely filed an action in the United States District Court for the District of South Carolina to vacate the arbitrator's decision on the grounds that the arbitrator exceeded his powers and acted in manifest disregard of the law by certifying an "opt out" class in violation of the written consent requirement of FLSA § 16(b). JA 24-32, 35-36. Petitioner argued that this Court's decisions in *McMahon* and *Gilmer* required that judicial review be sufficient to "ensure that arbitrators comply with the requirements of the statute." JA 23, 26.

The Secretary of Labor submitted an *amicus* letter to the district court urging the court to vacate the arbitrator's decision. As the Secretary explained, the

arbitrator's decision purported to bind absent class members without their written consent, in direct violation of § 16(b):

> It was precisely this result [binding class members without their consent] that Congress intended to preclude by enacting the current section 16(b) in 1947. As evinced in the statutory language ("unless he gives his consent in writing to become a party"), and the legislative history, Congress's clear aim was to ensure that each employee expressly consents to any collective adjudication of his or her rights under the FLSA.

JA 213. The Secretary emphasized that "an employee's right to participate in a collective action only upon submission of one's written consent is a substantive right . . . . [A]n employee can no more waive his right to consent to suit on his behalf than he can waive his right to the minimum wage or overtime pay." JA 213-214. The Secretary stressed that, "[b]ecause the statutory written consent provision is substantive, . . . courts should require arbitrators to comply with it." JA 214.

Despite Petitioner's reliance on *McMahon* and *Gilmer*, the district court held that the appropriate standard of review was one under which a court could vacate the arbitrator's award for legal error only if the arbitrator was "aware of the law, understood it correctly, found it applicable to the case before him, and yet chose to ignore it in propounding his decision." App. 20a (quoting *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 149 (4th Cir. 1994)) (internal alterations omitted). Under that standard, the district court held, an arbitrator's error of law, even if blatantly obvious, is not a basis for vacating an

award: "That the Court may have reached a different conclusion – or even that the arbitrator may have made a serious error of law – is of no consequence." App. 23a.

Applying this extremely deferential standard, the district court declined to vacate the arbitrator's decision. Noting that FLSA § 16(b) refers to actions filed in "court," the district court concluded that this reference "supplies uncertainty to the question of whether Congress intended the consent in writing requirement to govern arbitration proceedings as well as actions in court." App. 22a. The district court also held that the arbitrator did not "disregard or ignore the statute" because he "explicitly referred to § 16(b) in his award" and considered both parties' arguments. App. 22a. Under the standard applied by the district court, the "uncertainty" as to whether § 16(b) applies in arbitration and the arbitrator's explicit consideration of § 16(b) required the district court to uphold the award – regardless of whether the arbitrator's statutory interpretation was correct.

The district court unequivocally rejected Petitioner's contention that *McMahon* and *Gilmer* required the court to review the correctness of the arbitrator's interpretation and application of the FLSA: "The Court finds no basis in the law for Movants' suggestion that the Court review the arbitrator's award under a more rigorous standard, and the Court declines to undertake such a review here." App. 19a n.1.

D. The Court of Appeals Upholds The Arbitrator's Ruling Without Deciding Whether It Violated The FLSA.

Petitioner timely appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit.

Petitioner once again relied upon this Court's decisions in *McMahon* and *Gilmer*, as well as the Fifth Circuit's decision in *Williams*, to argue that courts have a responsibility to ensure that arbitrators comply with federal statutory requirements. *See* Pet.'s 4th Cir. Brief, available at 2006 WL 2726265 *34. Under that standard, Petitioner argued, the district court was required to vacate the arbitrator's decision because the arbitrator refused to apply the written consent requirement of § 16(b) and failed to comply with the arbitration agreement's requirement that the arbitrator follow the applicable law. *Id.* at *20-*23, *47-*49.

The Secretary of Labor filed an *amicus* brief in the court of appeals supporting Petitioner and urging vacatur. The Secretary explained that the written consent requirement of § 16(b) was substantive and mandatory:

> The Secretary's primary concern in this case is to establish that the [FLSA's] written consent requirement gives parties substantive rights that, under *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 26 (1991), an arbitrator must apply in arbitration. . . . The district court's decision upholds an arbitrator's explicit refusal to treat the written consent requirement as a substantive right and undercuts the useful-

> ness of arbitration as a forum for resolving FLSA disputes.

2006 WL 1911678 *10.

The court of appeals affirmed without deciding whether the arbitrator erred. It avoided the necessity of deciding that issue by the standard of review it applied:

> Importantly, any judicial review of an arbitration award is "extremely limited," and is, in fact, "among the narrowest known to the law." *U.S. Postal Serv. v. Am Postal Workers Union, AFL-CIO*, 204 F.3d 523, 527 (4th Cir. 2000) (internal quotation marks omitted). As we have consistently recognized, a reviewing court is entitled to "determine only whether the arbitrator did his job – not whether he did it well, correctly, or reasonably, but simply whether he did it." *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union*, 76 F.3d 606, 608 (4th Cir. 1996).

App. 7a.

Although the court of appeals acknowledged that "Congress inten[ded] that the 'opt-in' procedure [of § 16(b)] should apply in arbitration as in court proceedings" (App. 11a), it nonetheless upheld the arbitrator's refusal to apply § 16(b) – a refusal based solely on the fact that the parties had agreed to arbitrate. The court of appeals affirmed on the ground that Petitioner had not met its "heavy burden [of showing] that the arbitrator knowingly ignored applicable law" (App. 12a) because there was "a debatable contention" that the parties had waived their rights under § 16(b) by agreeing to arbitrate (App. 14a).

Notably, the court of appeals never purported to decide whether the arbitrator's refusal to comply with the written consent requirement of FLSA § 16(b) was correct or incorrect. Under the court of appeals' standard of review, the arbitrator's legal error was irrelevant absent a showing that the error was intentional. Although Petitioner argued that *McMahon* and *Gilmer* required that "judicial review of an arbitration award must be thorough enough to ensure that arbitrators comply with the requirements of the statute at issue" (2006 WL 2726265 *34), the court of appeals made no mention of this Court's statements in *McMahon* and *Gilmer*, nor did it attempt to reconcile them with its own explicit refusal to decide whether the arbitrator had properly interpreted and applied the FLSA.

REASONS FOR GRANTING THE PETITION

The court of appeals' failure to decide the propriety of the arbitrator's refusal to comply with the written consent requirement of FLSA § 16(b) disregards this Court's admonitions in *McMahon* and *Gilmer*, deepens an already serious circuit split, and undermines the entire basis upon which this Court held that federal statutory claims were arbitrable. The Court's expressed assumption that judicial review of arbitral decisions under federal statutes would be sufficient to ensure arbitral compliance with those statutes was a critical element of its holding that statutory claims were arbitrable. The Court should act to validate that assumption.

A. The Fourth Circuit's Decision In This Case Conflicts With This Court's Holdings In *McMahon* And *Gilmer* And, If Permitted To Stand, Will Raise Serious Questions Regarding The Arbitrability Of Statutory Claims.

The Fourth Circuit's decision in this case conflicts with this Court's decisions in *McMahon* and *Gilmer*. Those decisions held that claims under federal statutes were arbitrable. That holding was expressly premised on the stated belief that judicial review of arbitrators' interpretations of federal statutes would be sufficient to ensure that the arbitrators correctly interpreted and applied those statutes. The Fourth Circuit's decision in this case challenges that belief, since it applies a standard of review that eschews any effort to ensure that arbitrators correctly interpret and apply federal statutes.

1. *McMahon* and *Gilmer* premised their holdings that statutory claims were arbitrable upon the explicit assumption that judicial review would be adequate to ensure that arbitrators properly interpreted and applied federal statutes.

Judicial review of arbitral decisions has traditionally been quite narrow. This Court's early decisions regarding the standard of review of arbitral decisions involved arbitrations under collective bargaining agreements. In that context, the Court held that judicial review of arbitral awards should be extremely limited. *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596-597 (1960).

The Court recognized that arbitration of claims under federal statutes presented an entirely different issue because such claims are not merely private affairs. When federally created rights are at issue, the public has a strong interest in ensuring that the statutes establishing those rights are properly construed and applied. Initially, the Court held that claims under federal statutes were not arbitrable at all, at least in part because the standard of review might be inadequate. In *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), the Court held that a customer's claim against a broker under § 12 of the Securities Act of 1933 was not subject to arbitration, suggesting, *inter alia*, that the standard of review of an arbitration award might be inadequate to correct legal error by the arbitrators. *See* 346 U.S. at 436-437 ("Power to vacate an award is limited. . . . [T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.").

Three decades later, the Court changed its view of the adequacy of arbitration to resolve disputes under federal statutes – and the adequacy of judicial review to correct arbitral misinterpretation. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), the Court held that a claim under the Sherman Act was subject to international arbitration. The Court stated that, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.* at 628. The Court acknowledged the United States' interest in the application of its law, but stated that the arbitrators

would be obliged to apply American antitrust law (*id.* at 636-637) and that "the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed." *Id.* at 638.

The Court applied the principles of *Mitsubishi* to domestic arbitration in *McMahon*, which held that claims under the Securities Exchange Act of 1934 and RICO were arbitrable. The Court again emphasized that a party's substantive rights under the statutes would be the same in arbitration as in court. 482 U.S. at 229-230 (citing *Mitsubishi*). In response to the plaintiff's stated concern that arbitrators might not follow the law, the Court assured the plaintiff that the courts would make certain that they did: "[A]lthough judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute." *Id.* at 232.

The principles of *Mitsubishi* and *McMahon* were reiterated in *Gilmer*, which held that claims under the Age Discrimination in Employment Act were subject to arbitration. The Court rejected Gilmer's suggestion that judicial review of arbitral decisions would be inadequate, stating that judicial review would be "sufficient to ensure that arbitrators comply with the requirements of the statute at issue." 500 U.S. at 32 n.4 (internal quotations omitted) (quoting *McMahon*).

Thus, in holding that federal statutory claims were arbitrable, the Court heavily relied upon its determination that parties would have the same rights in arbitration as in court, and its expressed belief that judicial review of arbitral decisions would be

"sufficient to ensure" that arbitrators properly interpreted and applied the statutory mandates. That assumption is now being challenged.

2. The Fourth Circuit's decision in this case is inconsistent with *McMahon* and *Gilmer* and, if allowed to stand, will undermine the critical assumptions upon which *McMahon* and *Gilmer* were premised.

The Fourth Circuit held in this case that courts must affirm good faith arbitral misinterpretations of federal statutes because the courts may decide only "whether the arbitrator did his job – not whether he did it well, correctly or reasonably." App. 7a. If that standard is applied, the most critical assumptions underlying this Court's decisions in *McMahon* and *Gilmer* have proven to be false. If those assumptions are false, then the entire basis for the Court's holding that federal statutory claims are arbitrable has been called into question.

The Court's holding that statutory claims are arbitrable depended upon two assumptions: (1) a party who agrees to arbitrate statutory claims does not forgo his or her substantive rights under the statute, but only agrees to have those rights determined in a different forum (Mc*Mahon*, 482 U.S. at 229-230; *Gilmer*, 500 U.S. at 26); and (2) judicial review is sufficient to ensure that arbitrators comply with the requirements of the statute (*McMahon*, 482 U.S. at 232; *Gilmer*, 500 U.S. at 32 n.4). The Court could not have reached the result it did in *McMahon* and *Gilmer* unless it believed those assumptions to be true.

But those assumptions are not true in the Fourth Circuit. *McMahon* and *Gilmer* postulated a standard

of review that is "sufficient to ensure that arbitrators comply with the requirements of the statute." The Fourth Circuit makes no effort to ensure arbitral fidelity to federal statutes. Rather than requiring the arbitrator to comply with statutory mandates, the Fourth Circuit will permit vacatur only if the arbitrator has "knowingly ignored" applicable law. App. 12a. That standard explicitly contemplates that courts will uphold arbitrators' misinterpretation of federal statutes, even if their misinterpretation is clear. It is obviously not sufficient – or intended – to ensure that arbitrators correctly interpret or apply federal statutes.

If the Fourth Circuit's standard of review is allowed to stand, then the Court's assumptions in *McMahon* and *Gilmer* were erroneous. If those assumptions are wrong, then the fundamental basis for those decisions has been undermined.

B. The Circuits Have Split On The Appropriate Standard Of Review Of Arbitral Decisions Of Claims Under Federal Statutes.

Following the Court's decisions in *McMahon* and *Gilmer*, the circuits have fundamentally split over the appropriate standard of review of arbitral decisions interpreting and applying federal statutes. This split is at least partially due to the fact that the Court has not addressed the issue in the 17 years since *Gilmer* was decided, and has provided "virtually no guidance" to the lower courts. Calvin Sharpe, *Integrity Review of Statutory Arbitration Awards*, 54 HASTINGS L.J. 311, 335 (2003) ("[The lower courts have] entered the breach to supply content to the standards in the face of virtually no guidance from the Supreme Court.").

In the absence of guidance by the Court, the lower courts have fashioned their own diverse – and inconsistent – doctrines. The Second, Fourth and Eleventh Circuits have utilized an extremely deferential standard of review that mandates confirmation of arbitral decisions misinterpreting federal statutes, while two other circuits – the District of Columbia and Fifth Circuits – have construed *McMahon* and *Gilmer* as requiring courts to correct such misinterpretations.

1. The Fourth, Second and Eleventh Circuits apply the same highly deferential standard to all arbitral awards, regardless of whether they involve claims under federal statutes.

At least three circuits make no effort to ensure that federal statutory rights are sufficiently protected in arbitration. These circuits review arbitral decisions involving federal statutes with the same extreme deference that they apply to arbitral decisions in other contexts, such as disputes under collective bargaining agreements or disagreements involving interpretation of commercial contracts. In this case, for example, the Fourth Circuit applied a "manifest disregard" standard of review[2] it described

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[2] This Court identified "manifest disregard" as a ground for vacating an arbitral decision in *Wilko*, 346 U.S. at 436-437 (1953), and again in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). In *Hall Street Associates, LLC v. Mattel, Inc.*, No. 06-989 (March 25, 2008), the Court stated that the grounds for vacating an arbitral decision specified in § 10 of the Federal Arbitration Act (9 U.S.C. § 10) were exclusive. Slip op. at 9. Section 10 of the Federal Arbitration Act does not identify "manifest disregard" as a ground for vacatur. Although not re-

as "among the narrowest known to the law" (App. 7a), a phrase the court of appeals borrowed from its decision in *U.S. Postal Service v. American Postal Workers Union, AFL-CIO*, 204 F.3d 523, 527 (4th Cir. 2000), involving review of an arbitral decision under a collective bargaining agreement. The court of appeals simply ignored Petitioner's argument that *McMahon* and *Gilmer* required the courts to ensure arbitral fidelity to federal statutes by applying a heightened standard of review. By contrast, the district court did address Petitioner's argument on this point, but, despite *McMahon*'s and *Gilmer*'s clear instruction, found "no basis in the law" for Petitioner's argument that a "more rigorous standard" should apply when reviewing arbitral interpretations of federal statutes. App. 19a n.1.

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jecting "manifest disregard" as a standard of review, *Hall Street* suggested that *Wilko* used the phrase as a collective or shorthand term for the statutory grounds. Slip op. at 8. The Ninth Circuit reached the same conclusion in *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003) (*en banc*). In *Kyocera*, the Ninth Circuit held that the statutory grounds for vacatur were exclusive, but also acknowledged that arbitral awards could be vacated if the arbitrator manifestly disregarded the law or if the award was "completely irrational." 341 F.3d at 997 (quoting *French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902, 906 (9th Cir. 1986)). *Kyocera* explained that these standards were encompassed within § 10(a)(4) of the Federal Arbitration Act, which authorizes vacatur if arbitrators "exceeded their powers." 341 F.3d at 997. The Sixth Circuit reached a similar conclusion in *Federated Department Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862, 866 (6th Cir. 1990) ("Arbitrators do not exceed their authority unless they display a manifest disregard of the law."). *See also Comedy Club, Inc. v. Improv West Associates*, 502 F.3d 1100 (9th Cir. 2007) (post-*Kyocera* decision partially vacating arbitral award for "manifest disregard" where arbitrator misconstrued state statute).

Similarly, the Second Circuit expressly rejected the argument that courts must be more rigorous in reviewing arbitrators' interpretation and application of public laws than their resolution of private contract disputes. In *GMS Group, LLC v. Benderson*, 326 F.3d 75 (2d Cir. 2003), the court of appeals declined to construe *McMahon* and *Gilmer* as requiring courts to ensure arbitral compliance with federal statutes. It characterized the statements in *McMahon* and *Gilmer* regarding judicial review as mere dicta, and asserted that "the Court neither implied that a more stringent standard of review should be applied to federal statutory claims, nor differentiated between federal statutory claims and common law claims." 326 F.3d at 80.

The Eleventh Circuit reached the same conclusion in *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217 (11th Cir. 2000), in which it reviewed an arbitral decision rejecting a claim under Title VII. Holding that arbitration awards "will not be reversed due to an erroneous interpretation of law by the arbitrator," the court of appeals confirmed an arbitral decision in favor of the defendant because the plaintiff did "not assert that this alleged error was intentional or that the arbitrator made a conscious decision not to follow the appropriate legal standard." 211 F.3d at 1223.

The courts have recognized that the highly deferential standard applied by the Second, Fourth and Eleventh Circuits results in confirmation of plainly erroneous decisions. As one court acknowledged: "In accordance with the Second Circuit's rulings on the subject, this court has repeatedly refused to overturn arbitral awards on the ground of manifest disregard even if the decision reached by the arbitrator is

clearly erroneous." *Chisholm v. Kidder, Peabody Asset Management, Inc.*, 966 F. Supp. 218, 223 (S.D.N.Y. 1997).

2. The District of Columbia and Fifth Circuits apply a heightened standard of review for arbitral decisions involving federal statutes.

The District of Columbia and Fifth Circuits have taken a very different view of their responsibilities to ensure that arbitrators correctly interpret and apply federal statutes.

In *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997), the plaintiff brought a Title VII action against his employer. The district court ordered the parties to arbitrate pursuant to an arbitration provision in the employment contract. The court of appeals affirmed, and engaged in an extensive discussion of the standards applicable to that arbitration. The court of appeals "categorically reject[ed]" the suggestion that the law governing arbitration under collective bargaining agreements would apply to arbitration of federal statutory claims (*id.* at 1473), explaining that arbitrations under collective bargaining agreements occupied a unique place in the law (*id.* at 1473-1477).

After analyzing *McMahon* and *Gilmer*, the D.C. Circuit concluded that this Court's decisions regarding arbitrability of federal statutory claims rested on two critical assumptions: (1) that a party agreeing to arbitrate statutory claims does not forgo substantive rights afforded by the statute; and (2) that judicial review is sufficient to ensure arbitral compliance with statutory requirements. "These twin assumptions regarding the arbitration of statutory claims

are valid only if judicial review under the 'manifest disregard of the law' standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law." 105 F.3d at 1487. Thus, the court of appeals concluded, "the courts are empowered to review an arbitrator's award to ensure that its resolution of public law issues is correct." *Id.*

In *Williams v. Cigna Financial Advisors Inc.*, 197 F.3d 752 (1999), the Fifth Circuit held that review of an arbitral decision under the Age Discrimination in Employment Act must include a determination of the legal correctness of the arbitrators' application of the statute. The Fifth Circuit noted that this Court based its decision in *Gilmer* on "crucial assumptions or predictions" – the same assumptions identified by the District of Columbia Circuit in *Cole*. 197 F.3d at 760. On this basis, the Fifth Circuit held, the assumptions enunciated in *Gilmer* demanded meaningful judicial review of arbitral awards interpreting and applying federal statutes:

> The Supreme Court's assumptions and predictions in *Gilmer* assign heavy responsibilities to arbitrators and the federal courts. . . . The federal district courts and courts of appeals are charged with the obligation to exercise sufficient judicial scrutiny to ensure that arbitrators comply with their duties and the requirements of the statutes. . . . Accordingly, the judicial review of arbitral adjudication of federal statutory employment rights under the FAA and the "manifest disregard of the law" standard "must be sufficient to ensure that arbitrators comply with the requirements of the statute" at issue. *Gilmer*, 500 U.S. at 32 n. 4 (quoting *Shear-*

son/American Express, 482 U.S. at 232); *see Cole*, 105 F.3d at 1487.

197 F.3d at 760-761.[3]

Some years later, the Fifth Circuit reached the same conclusion in *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294 (5th Cir. 2004), a dispute involving the FLSA. In that case, the court of appeals affirmed a district court decision compelling arbitration of an FLSA claim over the plaintiffs' objection. In response to the plaintiffs' concern that the arbitrator might not award them statutorily mandated attorney's fees, the Fifth Circuit cited *Williams* and noted that "if an arbitrator failed to award fees he or she should have under the statute [plaintiffs] would have an effective remedy in federal court." *Id.* at 299 n.1.

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[3] The Dunlop Commission (a commission jointly appointed by the Secretaries of Labor and Commerce) reached a similar conclusion. While favoring arbitration to resolve claims under federal employment laws, the Commission strongly recommended that arbitral decisions applying these laws be subject to judicial review for legal error:

> Judicial review of arbitrator rulings must ensure that the arbitration decision reflects an appropriate understanding and interpretation of the relevant legal doctrines. While a reviewing court should defer to an arbitrator's fact findings so long as they have substantial evidentiary basis, the reviewing court's authoritative interpretation of the law should bind arbitrators as much [as] it now binds administrative agencies and lower courts.

U.S. Commission on the Future of Worker-Management Relations – Final Report 58 (1994), available at http://digitalcommons.ilr.cornell.edu/key_workplace/2.

The decisions of the District of Columbia Circuit in *Cole* and the Fifth Circuit in *Williams* and *Carter* are irreconcilable with the standards enunciated by the Fourth Circuit in this case as well as the Second and Eleventh Circuits in *GMS* and *Brown*. The Fourth, Second and Eleventh Circuits apply a standard of review that explicitly permits arbitral misinterpretation and misapplication of federal statutes. Those circuits have ignored or distinguished the Court's admonitions in *McMahon* and *Gilmer*. By contrast, the District of Columbia and Fifth Circuits regard this Court's assumptions in *McMahon* and *Gilmer* as critical elements of those decisions and therefore insist on heightened judicial scrutiny of arbitral decisions under federal statutes.

C. The Fourth Circuit's Decision Has Encouraged – And, If Permitted To Stand, Will Continue To Encourage – Arbitral Misapplications Of Federal Statutes.

By upholding the arbitrator's erroneous refusal to apply the written consent requirement of FLSA § 16(b), the court of appeals has already encouraged further arbitral misapplications of the FLSA and other federal statutes. If permitted to stand, the Fourth Circuit's decision will result in an expansion of such misapplications because there is no effective means to correct them.

Legal error that goes uncorrected expands exponentially. That has already begun to happen with respect to the arbitrator's error in this case. After the district court refused to vacate the arbitrator's decision, at least two other arbitrators hearing unrelated FLSA claims relied on the district court's decision in this case to certify "opt out" classes in FLSA actions, asserting that the written consent require-

ment of FLSA § 16(b) does not apply in arbitration. *See* App. 58a-59a. Now that the Fourth Circuit has affirmed the district court's decision, it may fairly be expected that other arbitrators will view the Fourth Circuit's decision as a blanket permission to disregard the written consent requirement of § 16(b) in FLSA arbitrations. Under the standard of review applied in the Fourth Circuit, these decisions must all be confirmed. The result will be a fracturing of what heretofore had been an unbroken line of authority requiring the application of § 16(b) in FLSA actions and a wholesale disconnect between FLSA litigation (where the written consent requirement of § 16(b) is unquestionably mandatory) and FLSA arbitrations (where the written consent requirement of § 16(b) will be at best optional). There will thus be one law for FLSA litigation and a completely different law for FLSA arbitrations. This is an inevitable result of the court of appeals' refusal to review the arbitrator's decision for legal error.

The same problem is likely to arise in the future under other federal statutory schemes as well. Just as one plainly erroneous but uncorrectable arbitral decision interpreting the FLSA has already spawned similar erroneous decisions in other arbitrations, so too will future uncorrected erroneous arbitral decisions interpreting other federal statutes likely expand unabated by any judicial restraint.

D. The Present Case Is An Ideal Vehicle For Deciding The Question Presented Because The Result Would Be Different Under The Correct Standard Of Review.

This is a particularly appropriate case to decide the question presented because the result in this case would be different if the Fourth Circuit had ap-

plied the appropriate standard of review. Had the court of appeals reached the legal issue involved, it would have had to determine that the arbitrator misinterpreted the FLSA in a manner that (a) frustrates clear congressional policy, (b) makes the FLSA statute of limitations impossible to apply, and (c) deprives non-consenting class members of their statutory rights.

1. Congress adopted the written consent requirement for public policy purposes to carefully balance the interests of employees and employers.

The FLSA written consent requirement that the arbitrator rejected was not arbitrarily chosen, nor was it selected for convenience or ease of application. Congress enacted the written consent requirement for specific public policy purposes in a careful effort to protect the interests of both employers and employees. That policy decision may not be overruled by an arbitrator who believes that his policy choices are better suited to implement the statute than the "disfavored" policy choice (App. 35a) enacted into law by Congress.

The history of FLSA § 16(b) is well known, and has been discussed in a number of published decisions.

Congress enacted the FLSA in 1938. Among other things, the FLSA required employers to pay employees one and one-half times the employees' hourly rate of pay for hours worked in excess of forty hours per week. 29 U.S.C. § 207.

In 1946, this Court decided *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680 (1946), which substantially expanded the scope of compensable time

under the FLSA. In the seven months following the *Mount Clemens* decision, nearly 2,000 FLSA class actions were filed against employers. *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 306 (3d Cir. 2003).

Congress responded to the torrent of litigation following *Mount Clemens* by passing the Portal-to-Portal Act, Pub. L. No. 80-49, ch. 52, reprinted in *United States Code Congressional Service* (Laws of 80th Cong., 1st Sess., 1947) at 81-87. Congress's expressed concern was that, without the Act, liability under the FLSA "would bring about the financial ruin of many employers . . . ; the credit of many employers would be seriously impaired; [and] the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged." *Id.* at 81-82.

The Portal-to-Portal Act legislatively overruled *Mount Clemens*. Congress also sought to avoid future "excessive and needless litigation and champertous practices" by prohibiting "opt out" class actions. The Portal-to-Portal Act thus added the written consent requirement now contained in § 16(b). *Id.* at 85.

Congress added the written consent requirement to § 16(b) "for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions." *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989); *see also Cameron-Grant v. Maxim Healthcare Services, Inc.*, 347 F.3d 1240, 1248 (11th Cir. 2003) (purpose of § 16(b) written consent requirement was to "prevent[ ] large group actions, with their vast allegations of liability, from being brought on behalf of employees who had no real involvement in, or knowledge of, the lawsuit" (citation and internal quotations omitted)).

As the Third Circuit has recognized, "mandating an opt-in class or an opt-out class is a crucial policy decision" (*De Asencio*, 342 F.3d at 311) that "profoundly affects the substantive rights of the parties to the litigation" (*id.* at 310). Congress enacted the written consent requirement "to strike a balance to maintain employees' rights but curb the number of lawsuits." *Id.* at 306. Thus, Congress allowed employees to sue on behalf of others similarly situated, but consciously restricted the class to individuals who expressly consented in writing to join the action. This effort to strike a balance is clearly a substantive policy decision made by Congress. As the Secretary of Labor noted in her *amicus* brief, the arbitrator's decision to substitute his own policy preferences for those of Congress – and the courts' refusal to vacate it – "threatens to upset the litigation balance delicately but expressly set by Congress." 2006 WL 1911678 *19-*20.

The arbitrator attempted to justify his pursuit of his personal policy preference for a larger class of plaintiffs by characterizing Congress's written consent requirement as merely "procedural." This characterization was essential to the arbitrator's holding because *McMahon* and *Gilmer* emphasize that parties do not surrender their statutory rights by agreeing to arbitrate, and the arbitrator's determination that the parties (including the unnamed class members) had "waived" their rights under § 16(b) was based solely on the fact that the parties had agreed to arbitrate – not upon any provision of the arbitration agreement. But the written consent requirement of § 16(b) is not a mere "procedural" device to be discarded at will – it reflects a conscious policy decision by Congress designed to protect the interests

of both employers and employees, a policy decision that the arbitrator was not free to reject.

2. It is impossible to apply the FLSA statute of limitations without the written consent requirement.

The written consent requirement of § 16(b) is so embedded in the FLSA that the statute of limitations for absent class members cannot be calculated without it. The FLSA expressly provides that, "in the case of a collective or class action instituted under the Fair Labor Standards Act," the statute of limitations for each absent class member does not cease to run when the action is filed – it ceases to run only "on the subsequent date on which [the class member's] written consent is filed in the court in which the action was commenced." 29 U.S.C. § 256(b).

An arbitral attempt to avoid the written consent requirement is thus impossible without ripping apart the entire fabric of the FLSA. If an arbitrator dispenses with the written consent requirement, then the arbitrator must also concoct a completely new method of calculating the statute of limitations – a method that would directly violate 29 U.S.C. § 256(b).[4]

The written consent requirement of § 16(b) is thus an integral part of the entire congressional scheme for enforcing the FLSA. It cannot be ignored

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[4] The arbitrator in this case apparently assumed that the statute of limitations for absent members of the "opt out" class he certified would cease to run at the time the original arbitration proceeding was filed. That assumption is contradicted by the unambiguous language of 29 U.S.C. § 256.

without completely upsetting the entire structure carefully designed by Congress.

3. The arbitrator's attempt to bind non-consenting class members violates the FLSA and raises serious due process concerns.

The arbitrator's avoidance of the written consent requirement of FLSA § 16(b) presents serious due process concerns because he purported to bind non-consenting class members, notwithstanding uniform case law stating that class members in an FLSA action cannot be bound unless they have filed written consents pursuant to § 16(b). These concerns further demonstrate why the written consent requirement of FLSA § 16(b) must apply in arbitration.

If the written consent requirement of § 16(b) means anything, it means that no purported class "representative" may represent an employee's interests in an FLSA action unless the employee affirmatively authorizes that representation. Accordingly, the courts have uniformly held that unnamed members of an FLSA collective action are not bound by, nor may they benefit from, any determination in the action unless they file written consents. *McElmurry v. U.S. Bank N.A.*, 495 F.3d 1136, 1139 (9th Cir. 2007) (In an FLSA collective action "only those plaintiffs who expressly join the collective action are bound by its results."); *Whalen v. W.R. Grace & Co.*, 56 F.3d 504, 506 n.3 (3d Cir. 1995) ("[U]nder § 16(b) ... no person will be bound by or may benefit from a judgment unless he or she has affirmatively 'opted into' the class by filing a written consent with the court."); *LaChapelle*, 513 F.2d at 288 ("[N]o person will be bound by or may benefit from judgment unless he has affirmatively 'opted into' the class; that

is, given his written, filed consent."); *Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 536 (8th Cir. 1975) (quoting *LaChapelle*); *Woods v. New York Life Ins. Co.*, 686 F.2d 578, 580 (7th Cir. 1982) (in an FLSA collective action, "the class member must opt in to be bound"). As the Secretary of Labor's *amicus* brief noted, the written consent requirement "protects employees in a fundamental way" by ensuring that they are not bound by a decision unless they have expressly agreed to be bound. 2006 WL 1911678 *18.

In this case, the arbitrator purported to bind the absent class members – and to authorize purported representatives to act on their behalf – without their express consent, notwithstanding the unambiguous language of § 16(b) and a consistent line of judicial decisions saying that this cannot be done. This assumption of authority over non-consenting individuals implicates the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999). That is particularly the case here, where Congress has expressly affirmed that principle in unequivocal terms by providing that absent class members may not be parties to an action unless they expressly consent in writing.

The arbitrator has thus purported to do something that cannot be done – bind non-consenting members of the class in violation of their express statutory right not to be bound. The patently futile nature of this effort is further reason why the arbitrator's decision is erroneous.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PETER J. GREGORA
LAURA W. BRILL
Irell & Manella LLP
1800 Avenue of the Stars
Los Angeles, CA 90067
(310) 277-1010

HENRY L. PARR, JR.
DAVID H. KOYSZA
Wyche, Burgess, Freeman and Parham, P.A.
Post Office Box 728
Greenville, SC 29602
(864) 242-8200

DAN HIMMELFARB
Counsel of Record
ROBERT P. DAVIS
TAMARA S. KILLION
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

APRIL 2008

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

LONG JOHN SILVER'S RESTAURANTS, INC.;
LONG JOHN SILVER'S, INC.,
Plaintiffs-Appellants,

v.

ERIN COLE; NICK KAUFMAN; VICTORIA MCWHORTER,
Defendants-Appellees.

SECRETARY OF LABOR,
Amicus Supporting Appellants.

NO. 06-1259

Appeal from the United States District Court for the District of South Carolina, at Greenville.
Henry F. Floyd, District Judge.
(6:05-CV-03039-HFF)

ARGUED: DECEMBER 6, 2007
DECIDED: JANUARY 28, 2008

Before MICHAEL and KING, Circuit Judges, and Catherine C. BLAKE, United States District Judge for the District Of Maryland, sitting by designation.

Affirmed By Published Opinion. Judge King Wrote The Opinion, In Which Judge Michael And Judge Blake Joined.

OPINION

KING, Circuit Judge:

Long John Silver's Restaurants, Incorporated, and Long John Silver's, Incorporated (collectively, "LJS"), seek appellate relief from a January 20, 2006 ruling of the district court declining to vacate an arbitration award. *Long John Silver's Rests., Inc. v. Cole*, No. 6:05-cv-03039-HFF (D.S.C. Jan. 20, 2006) (the "Opinion").[1] In the underlying arbitration proceedings, three former LJS managerial employees, Erin Cole, Nick Kaufman, and Victoria McWhorter (the "Claimants"), contended that LJS violated the Fair Labor Standards Act (the "FLSA") by failing to pay them and other LJS employees the overtime compensation required by law. In September 2005, the arbitrator ruled, in his Class Determination Partial Final Award (the "Class Award"),[2] that the "opt-in" class certification provision of the FLSA (codified at 29 U.S.C. § 2 16(b)) did not apply in the arbitration proceedings. The arbitrator also ruled that, pursuant to the controlling arbitration agreement, the arbitration proceedings were governed by the "opt-out" class certification provision of the Supplementary Rules for Class Arbitrations of the American Arbitration Association (the "AAA Class Rules").

In this appeal, LJS contends that the district court erred in two respects when it declined to vacate the Class Award: first, in failing to recognize that the arbitrator, in making the Award, had manifestly disregarded controlling legal principles; and, second, in

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[1] The Opinion can be found at J.A. 281-91. (Citations herein to "J.A. ___" refer to the contents of the Joint Appendix filed by the parties in this appeal.)

[2] The Class Award can be found at J.A. 47-71.

failing to recognize that the arbitrator had exceeded the scope of his authority. As explained below, we reject these contentions and affirm.

I.

A.

As background in this matter, the Claimants are former managers and managerial assistants of various LJS restaurants. They maintain that LJS has been engaged in unlawful employment practices, subjecting them and others to payroll deductions and salary givebacks to cover losses in LJS's restaurant operations. These unlawful practices, according to the Claimants, violated the FLSA and its regulations on overtime pay, and resulted in insufficient compensation being paid to them and others.

In 1995, LJS initiated a mandatory arbitration procedure and commenced the use of a uniform arbitration agreement for disputes with its employees. The arbitration agreement prepared for this purpose was executed by each of the Claimants. The agreement provides, in pertinent part, that

> [a]ny arbitration will be administered by the American Arbitration Association under its commercial arbitration rules (except as modified herein) ... The arbitrator shall apply the substantive law (and the laws and remedies, if applicable), in the state in which the claim arose, or federal law, or both, depending upon the claims asserted.

J.A. 84.

The AAA Class Rules empower an arbitrator to make certain determinations about whether an arbitration agreement permits an arbitration proceeding

to be conducted as a class arbitration. In the event that the agreement so permits, the arbitrator must decide whether the arbitration should proceed as a class arbitration by considering the criteria enumerated in the AAA Class Rules, as well as "any law or agreement of the parties the arbitrator determines applies to the arbitration." *See* AAA Class Rule 4(a). When the arbitrator has decided that the arbitration should proceed as a class arbitration, he must set forth the basis for that decision in a Class Determination Award, which defines the class, the notice to be given, and the grounds for exclusion of class members. *See* AAA Class Rule 5. AAA Class Rule 7 provides that a final award on the merits of a class arbitration must define the class "with specificity," including "those who have elected to opt out of the class."

Like the AAA Class Rules, § 16(b) of the FLSA contains a provision governing class action proceedings. Unlike the "opt-out" provision of the AAA Class Rules, however, § 16(b) of the FLSA is an "opt-in" class provision, providing that

> [n]o employee shall be a party plaintiff to any ... action [under the FLSA] unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b) (the "FLSA § 16(b) provision" or the "§ 16(b) provision").

B.

On January 21, 2004, Claimants Cole and Kaufman initiated an arbitration proceeding before the AAA, on behalf of themselves and others similarly situated. They alleged that LJS, in failing to prop-

erly compensate them, had violated the FLSA.[3] On March 4, 2005, the Claimants filed an amended arbitration complaint with the AAA, adding McWhorter as a representative claimant and seeking class certification pursuant to the AAA Class Rules. LJS then secured rulings from the arbitrator on certain class certification issues, ultimately leading to this appeal.

First, on June 15, 2004, the arbitrator made a clause construction award, ruling that the arbitration agreement did not preclude a class arbitration proceeding. Although the award did not decide whether a class would ultimately be certified in the arbitration proceeding, LJS promptly initiated suit in the district court, seeking to vacate the award. LJS made two assertions in its lawsuit: (1) that the FLSA § 16(b) provision permitting employees to pursue collective actions is a procedural right, and thus had been waived by the arbitration agreements; and (2) that conducting a class arbitration proceeding is inconsistent with the FLSA. On September 15, 2005, the district court dismissed that suit for lack of subject matter jurisdiction. *See Cole v. Long John Silver's Rests., Inc.*, 388 F. Supp. 2d 644 (D.S.C. 2005).[4]

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[3] A related civil action involving similar compensation issues had been previously initiated by a former LJS managerial employee in a Tennessee federal court. That case was dismissed in 2004 because the claims were deemed subject to arbitration. *See Johnson v. Long John Silver's Rests., Inc.*, 320 F. Supp. 2d 656 (M.D. Tenn. 2004), *aff'd*, 414 F.3d 583 (6th Cir. 2005). After the Tennessee lawsuit was filed, Johnson sought certification of an "opt-in" class pursuant to the FLSA § 16(b) provision. LJS opposed any such class certification, however, and moved to compel arbitration.

[4] LJS initially pursued an appeal in this Court of the district court's dismissal of its challenge to the clause construction

Next, on September 19, 2005, the arbitrator issued its Class Award, which LJS challenges in this appeal. In the Class Award, the arbitrator ruled that the Claimants could serve as representative plaintiffs in an "opt-out" class arbitration proceeding — the class being composed of current and former LJS managerial employees having potential FLSA claims. In rendering the Class Award, the arbitrator was called upon to address the apparent conflict between the "opt-in" aspect of the FLSA § 16(b) provision, on the one hand, and the "opt-out" aspect of the AAA Class Rules, on the other. In the Class Award, the arbitrator decided that, because "there is no evidence of any congressional intent" to make the right to the "opt-in" requirement of the § 16(b) provision nonwaivable, the FLSA did not preclude enforcement of the parties' agreement to arbitrate pursuant to the AAA Class Rules. Class Award 7. Accordingly, the arbitrator applied the "opt-out" provisions of AAA Class Rule 7.

C.

On October 25, 2005, LJS filed suit in the District of South Carolina, seeking to vacate the Class Award, and challenging the arbitrator's ruling that the FLSA § 16(b) provision was not controlling.[5] On January 20, 2006, the district court filed its Opinion denying LJS's request for relief. By the Opinion, the court rejected LJS's contention that the FLSA dispositively provides employees a nonwaivable substan-

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award. On January 10, 2007, the appeal was dismissed at LJS's request.

[5] The Secretary of Labor made an *amicus curiae* submission to the district court supporting LJS's motion to vacate. More particularly, she asserted that the FLSA § 16(b) provision constituted substantive law and was nonwaivable.

tive right to "opt-in" proceedings under the § 16(b) provision. Having determined that no "clear principle of law bound the arbitrator in this case," the court further ruled that the arbitrator had satisfied his obligation to render a reasoned award, that he had not manifestly disregarded the applicable legal principles, and that he had instead "thoroughly analyzed the relationship of [the § 16(b) provision] and the arbitration agreement." Opinion 7. Indeed, as the court recognized, because the arbitration agreement "undoubtedly gave the arbitrator authority to invoke equity, it provided him with the power to render any relief which a court could award." *Id.* at 9. LJS has appealed, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

In conducting an appellate review of a district court's refusal to vacate an arbitration award, we are obliged to accept findings of fact that are not clearly erroneous and to assess conclusions of law de novo. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-49 (1995). Importantly, any judicial review of an arbitration award is "extremely limited," and is, in fact, "among the narrowest known to the law." *U.S. Postal Serv. v. Am. Postal Workers Union, AFL-CIO*, 204 F.3d 523, 527 (4th Cir. 2000) (internal quotation marks omitted). As we have consistently recognized, a reviewing court is entitled to "determine only whether the arbitrator did his job — not whether he did it well, correctly, or reasonably, but simply whether he did it." *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union*, 76 F.3d 606, 608 (4th Cir. 1996). "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a

court is convinced he committed serious error does not suffice to overturn his decision." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

An arbitration award may be vacated if it fails to draw its essence from the controlling agreement. *United Paperworkers Int'l Union*, 484 U.S. at 36. And such an award may be overturned if it flowed from an arbitrator's manifest disregard of the applicable law. *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 (4th Cir. 1998). In order to secure judicial relief on such grounds, it must be shown that the arbitrator, in making his ruling, was "aware of the law, understood it correctly, found it applicable to the case before [him], and yet chose to ignore it in propounding [his] decision." *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 149 (4th Cir. 1994). As one of our sister circuits has explained, an arbitrator does not act in manifest disregard of the law unless: "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator[ ] refused to heed that legal principle." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995).

III.

LJS makes two contentions in support of its position on appeal. First, it maintains that the arbitrator's certification of an "opt-out" class resulted from a manifest disregard of the applicable legal principles, and that, in particular, the arbitrator disregarded the FLSA § 16(b) provision. Second, LJS asserts that the arbitrator exceeded the scope of his authority in certifying an "opt-out" arbitration class, rather than applying the "opt-in" aspect of the § 16(b) provision.

A.

In pursuing these contentions, LJS asserts, as a threshold matter, that an employee cannot be made a party to an FLSA-related civil proceeding without his consent, and that this statutory right, being both fundamental and substantive, is not waivable.[6] The apparent conflict between the AAA Class Rules and the FLSA § 16(b) provision would necessarily be resolved in favor of an "opt-in" procedure if the consent requirement of § 16(b) is a substantive right, not waivable by an arbitration agreement. As the Supreme Court noted in *Gilmer v. Interstate/Johnson Lane Corp.*, parties who agree to arbitrate a statutory claim "do[ ] not forgo the substantive rights afforded by the statute," but rather "submit[ ] to their resolution in an arbitral, rather than a judicial, forum." 500 U.S. 20, 26 (1991) (internal quotation marks omitted). It is well-settled that a contract to arbitrate an FLSA claim will not be enforceable if "Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000). Therefore, in order to prove that the "opt-in" requirement of the FLSA could not be waived by the parties' agreement to arbitrate under the AAA Class Rules, LJS must demonstrate that Congress expressly intended to preclude a waiver of the "opt-in" procedure for class arbitration of FLSA claims, by reference to "the text of the FLSA, its legislative history, or an 'inherent conflict'" between the AAA Class Rules and the FLSA's "underlying pur-

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[6] In an *amicus curiae* submission in this appeal, the Secretary of Labor supports LJS's position, asserting, as she did in the district court, that the "written consent" provision of the FLSA § 16(b) provision is a substantive and unwaivable right.

poses." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. 2002); *see also Gilmer*, 500 U.S. at 26.

LJS has failed to make any such demonstration here. For example, LJS posits that, in the FLSA § 16(b) provision's mandate that "consent [must be] filed in the court in which such action is brought," the word "court" must be accorded its general meaning, which, LJS asserts, would include an arbitration forum. LJS also references a portion of the legislative history of the § 16(b) provision — particularly, the remarks of Senator Donnell during a 1947 Senate debate on FLSA amendments that included the § 16(b) provision — suggesting that it would be "'unwholesome'" to allow suits under the FLSA which are "'not brought with the actual consent or agency of the individuals for whom an ostensible plaintiff filed the suit.'" Br. of Appellants 27-28 (citing *Arrington v. Nat'l Broad. Co.*, 531 F. Supp. 498, 502 (D.D.C. 1982) (quoting 93 Cong. Rec. 2182 (1947)));[7] *see also Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989) (observing that Congress enacted the § 16(b)

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[7] Senator Donnell's remarks during the proposed 1947 debate on the FLSA amendments included the following:

> "Obviously, . . . this is a wholesome provision, for it is certainly unwholesome to allow an individual to come into court alleging that he is suing on behalf of 10,000 persons and actually not have a solitary person behind him, and then later on have 10,000 men join in the suit, which was not brought in good faith, was not brought by a party in interest, and was not brought with the actual consent or agency of the individuals for whom an ostensible plaintiff filed the suit."

Arrington, 531 F. Supp. at 502 (quoting 93 Cong. Rec. 2182 (1947)).

provision "for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions"). Although LJS's references to the text and legislative history of the FLSA reassure us of Congress's intention that the "opt-in" procedure should apply in arbitration as in court proceedings, they fail to also convince us that Congress expressly intended that the "opt-in" procedure could not be waived by the parties' agreement to an alternate procedure.

We also are not persuaded by LJS' s reliance on a prior decision of this Court. LJS highlights a footnote in *Adkins v. Labor Ready, Inc.*, in which we observed that the fee provision in § 16(b) (a provision LJS contends is analogous to the "opt-in" aspect of the § 16(b) provision) is a substantive right retained by parties in arbitration. *See* 303 F.3d at 502 n.1. LJS acknowledges, however, that no court has explicitly ruled that the "opt-in" provision of the § 16(b) provision creates a substantive, nonwaivable right.[8] Put simply, it is far from clear that the "opt-in" aspect of the § 16(b) provision is such a nonwaivable substantive right. Having so concluded, we turn to LJS's contentions that the arbitrator manifestly disre-

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[8] By contrast, the Claimants point out that the Supreme Court has recognized that employees are entitled to waive their right to collective action by agreeing to mandatory arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (upholding compulsory arbitration agreement under the Age Discrimination in Employment Act of 1967). If the right to initiate a collective action can be waived, as the Claimants assert, it may be inferred that an "opt-in" procedure relating to any such right (here, the FLSA § 16(b) provision) can also be waived.

garded the applicable legal principles and exceeded the scope of his authority in rendering the Class Award.

B.

1.

In its first contention, LJS asserts that the district court erred in refusing to vacate the Class Award on the basis that the arbitrator had manifestly disregarded applicable federal law — namely, the FLSA § 16(b) provision's "opt-in" requirement. As discussed above, any judicial review of an arbitration award must be an extremely narrow exercise. *See United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987); *U.S. Postal Serv. v. Am. Postal Workers Union, AFL-CIO*, 204 F.3d 523, 527 (4th Cir. 2000); *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union*, 76 F.3d 606, 608 (4th Cir. 1996). In order to overturn an arbitration award on the basis of the arbitrator's manifest disregard of the law, the party pursuing that effort must sustain a heavy burden, and is obliged to show that the arbitrator knowingly ignored applicable law when rendering his decision. *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 149 (4th Cir. 1994).

In making the Class Award, the arbitrator specifically assessed the possibility that "Congress [had] evinced an intention to preclude a waiver of judicial remedies" for the consent mandate of the FLSA § 16(b) provision. Class Award 7 (citing *Gilmer*, 500 U.S. at 26). He concluded, however, that "there is no evidence of any congressional intent which would impose an opt-in provision upon a class action being privately arbitrated," and thus that such a procedure remained waivable. *Id.* After careful analysis, the

arbitrator then ruled in the Class Award that the use of an "opt-out" class in the class arbitration proceeding was proper. According to the arbitrator, LJS's pretrial maneuvering in the *Johnson* case, *see supra* note 3, had occasioned a substantial delay in the processing of potential claims, and had threatened the resolution of legitimate claims, such that the adoption of the "opt-in" procedure of the § 16(b) provision "would now create a fundamental unfairness" by "significantly reduc[ing] the class population in derogation of fundamental FLSA objectives." Class Award 10. On this point, the arbitrator emphasized that equity would be better served by safeguarding the rights of potential claimants "'sidelined' during the progress of this case." *Id.* at 11. And the arbitrator reasoned that the "opt-out" procedure best achieved FLSA's objective of permitting states (and by analogy, private parties) to "adopt higher standards than those established in the [FLSA]," as well as the Federal Arbitration Act's preference for "the procedural rules defined by private contract." *Id.* at 8.

In rejecting LJS's challenge to the Class Award, the district court acknowledged the uncertainty as to whether Congress intended to apply the FLSA § 16(b) provision's "consent in writing" requirement in arbitration proceedings, and concluded that the arbitrator was not, therefore, bound by any "clear principle of law" in rendering the Award. Opinion 5. The court further observed that the parties had been accorded "a full and fair opportunity to present their competing views of the relevance of FLSA § 16(b) to the arbitration proceedings," and that the Class Award was based on a reasonable interpretation of the FLSA and the Federal Arbitration Act. *Id.* at 7.

On this record, we are similarly convinced that the arbitrator "did his job." *See Mountaineer Gas*, 76 F.3d at 608. Because there is a debatable contention that the FLSA § 16(b) provision did not explicitly overrule the "opt-out" feature of the arbitration agreement, the arbitrator did not ignore the FLSA or any other applicable legal principles when he certified an "opt-out" class in the Class Award, and LJS has thus not sustained its heavy burden to demonstrate otherwise. *See Remmey*, 32 F.3d at 149. The district court accordingly did not err in declining to vacate the Class Award on this basis.

2.

LJS's second appellate contention is that the district court erred in failing to vacate the Class Award on the ground that the arbitrator exceeded the scope of his authority under the arbitration agreement by certifying an "opt-out" arbitration class. On this point, LJS argues that the plain terms of the arbitration agreement required the arbitrator to "apply the 'federal law' regarding the claim at issue, provide 'the same protections as a court of law,' and award only that relief available in a 'court of law.'" Br. of Appellants 47. More specifically, LJS relies on specific language drawn from the arbitration agreement. *See* J.A. 81 ("If you win, the arbitrator can award you anything you might seek through a court of law."); *id.* at 84 ("The arbitrator shall apply the substantive law (and the laws of remedies, if applicable) in the state in which the claims arose, or federal law, or both ...."). LJS asserts that, by approving an "opt-out" class, the arbitrator ignored the terms of the agreement requiring him — in exercising the authority he derived therefrom — to apply the "opt-in" requirement of the FLSA § 16(b) provision.

The district court deemed LJS's argument on this point unpersuasive, observing that the arbitrator's decision in the Class Award to certify an "opt-out" class was simply a matter of contract interpretation, and thus well within his authority. The central question, as framed by the arbitrator and the court, was whether the arbitration agreement that incorporated the AAA Class Rules authorized the use of an "opt-out" procedure. With regard to the proposition that the arbitration agreement unambiguously required the arbitrator to adhere to the FLSA § 16(b) provision, the court disagreed, observing that the arbitrator was forced to interpret the agreement precisely "*because of* its ambiguity as to whether § 16(b) or the AAA rules would apply to class certification." Opinion 9 (emphasis in original).

Indeed, the first provision of the arbitration agreement upon which LJS relies — that an employee is entitled in arbitration to anything he might seek in a court of law — appears only in a portion of the agreement generally describing the benefits of arbitration. And the second provision quoted by LJS — requiring the arbitrator to apply substantive law — could not have limited the arbitrator's authority in the manner LJS proposes, when, as we have already explained, it is far from clear that the "opt-in" procedure of the FLSA § 16(b) provision creates a substantive, nonwaivable right.[9]

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[9] LJS also asserts that the arbitrator, in making the Class Award, relied on his personal notions of right and wrong, thus exceeding the scope of his authority under the arbitration agreement. In support of this proposition, LJS relies on the arbitrator's statement in the Class Award that, in light of LJS's "endless procedural machination ... in *Johnson* and ... in this arbitration," "[e]quity is better served by preserving the rights

In making our extremely limited review of the Class Award, we must, in these circumstances, agree with the district court that the arbitrator did not exceed the scope of his authority by certifying an "opt-out" class. *See Am. Postal Workers Union*, 204 F.3d at 527. As the district court recognized, the arbitrator "did what he was supposed to do: he analyzed two conflicting interpretations of the arbitration agreement and made a reasoned decision as to why an opt-out class should be certified." Opinion 9. The court thus correctly ruled that it lacked the authority to vacate the Class Award, which was "at the very most" only an arguable contravention of the arbitrator's powers. *Id.* at 10. In these circumstances, we are obliged to affirm the district court.

IV.

Pursuant to the foregoing, we reject the appellate contentions of LJS with respect to the Class Award and affirm the Opinion of the district court.

AFFIRMED

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of potential claimants who have been 'sidelined' during the progress of this case." Class Award 10-11. In this regard, we agree with the district court that LJS's assertion is contradicted by the fact that the arbitrator relied on settled principles in support of his reliance on equity, and by the provision of the arbitration agreement empowering the arbitrator to "award any relief which a court could award." Opinion 9.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

LONG JOHN SILVER'S RESTAURANTS, INC.
AND LONG JOHN SILVER'S, INC.,
Movants,

v.

ERIN COLE, NICK KAUFMAN, AND VICTORIA
MCWHORTER,
Respondents.

CIVIL ACTION NO. 6:05-3039-HFF

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This is an action to vacate a class determination award of an arbitrator who determined that Respondents would be representative plaintiffs of an opt-out class. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332. Currently pending before the Court is Movants' motion to vacate the arbitrator's decision. For the reasons stated below, the Court will deny the motion.

II. FACTUAL AND PROCEDURAL HISTORY

Respondent Erin Cole, Respondent Nick Kaufman, and Respondent Victoria McWhorter (collectively "Respondents") are former employees of

Movant Long John Silver's Restaurants, Inc. and Movant Long John Silver's, Inc. (collectively "Movants"). During the tenure of Respondents' employment, Movants instituted a mandatory arbitration procedure covering certain disputes between themselves and their employees. Subsequently, on December 19, 2003, Respondents initiated a collective arbitration proceeding before the American Arbitration Association (AAA) in which they alleged that Movants had violated the Fair Labor Standards Act ("FLSA" or "the Act"), 29 U.S.C. § 201 *et seq.*, by failing to pay Respondents and similarly-situated employees overtime pay which they were due. Initially, the arbitrator necessarily conducted a "clause construction hearing" in which he determined that the arbitration agreement between Movants and Respondents permits Respondents to bring their claims in a class proceeding. Movants, arguing that FLSA §16(b)'s provisions permitting employees to bring collective actions are procedural and waivable, asked this Court to vacate the arbitrator's clause construction award. The Court, however, dismissed the action for lack of jurisdiction. *Cole v. Long John Silvers Restaurants, Inc.*, 388 F.Supp.2d 644 (D.S.C. 2005).

While Movants' motion to vacate the arbitrator's clause construction award was pending before the Court, the arbitrator issued a class determination partial final award in which he determined that Respondents would be representative plaintiffs in an opt-out class which would be composed of current and former employees of Movants who have potential FLSA claims. Movants now bring this action requesting that the Court vacate the arbitrator's decision to certify an opt-out class.

III. STANDARD OF REVIEW

It is well settled that a court's review of an arbitration award "is among the narrowest known to the law." *United States Postal Service v. Am. Postal Workers Union, AFL-CIO*, 204 F.3d 523, 527 (4th Cir. 2000) (internal quotation marks omitted). "A court sits to 'determine only whether the arbitrator did his job–not whether he did it well, correctly, or reasonably, but simply whether he did it.'" *Id.* (quoting *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Intl Union*, 76 F.3d 606, 608 (4th Cir. 1996)). "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *United Paper-Workers Intl Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987). Thus, the Court's review of the arbitrator's decision to certify an opt-out class is extremely narrow in scope.[1]

IV. DISCUSSION

Movants assert two bases in support of their motion to vacate the arbitrator's class determination award. First, Movants contend that the arbitrator acted in manifest disregard of the law and, second, Movants claim that the arbitrator exceeded the scope of his authority. The Court finds that neither argument supports vacatur.

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[1] The Court finds no basis in the law for Movants' suggestion that the Court review the arbitrator's award under a more rigorous standard, and the Court declines to undertake such a review here.

A. Manifest Disregard of the Law

A court's authority to vacate actions of an arbitrator which are in manifest disregard of the law is clearly established. *E.g., Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 (4th Cir. 1998); *Gallus Invs., L.P. v. Pudgie's Famous Chicken, Ltd.*, 134 F.3d 231, 233-34 (4th Cir. 1998). In exercising this authority, however, a court must proceed cautiously, as a "court's belief that an arbitrator misapplied the law will not justify vacation of an arbitral award." *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 149 (4th Cir. 1994). Instead, a court may vacate an award only where a party has shown "that the arbitrator[ ] [was] aware of the law, understood it correctly, found it applicable to the case before [him], and yet chose to ignore it in propounding [his] decision. *Id.* (citing *National Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731*, 990 F.2d 957, 961 (7th Cir. 1993); *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111-12 (2d Cir. 1993)). Persuasive authority also indicates that a court's authority to vacate is contingent upon the law allegedly ignored bearing the status of a clearly established governing principle. *See, e.g., Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998) (noting that in order to vacate a court must find that "the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 197, 202 (6th Cir. 1995) ("[A]n arbitration panel does not act in manifest disregard of the law unless (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle[.]"); *Health Services Management Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992) ("[T]here must be something beyond and different

from mere error in law or failure on the part of the arbitrators to understand or apply the law; it must be demonstrated that the majority of the arbitrators deliberately disregarded what they knew to be the law in order to reach the result they did[.]"); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986) ("The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly established governing legal principle but decides to ignore or pay no attention to it.").

In the instant case, Movants contend that FLSA § 16(b) requires that collective actions brought under the Act be certified using opt-in class procedures. Movants base this contention on the following language from § 16(b):

> An action to recover [under the Act] may be maintained against any employer in any federal or state court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

In Movants' view, this section of the FLSA provides employees with a substantive right to consent to any action filed on their behalf under the Act. This right, Movants maintain, cannot be waived in an arbitration agreement and, thus, continues to apply with full force in private arbitration proceedings.

This language cannot bear the import that Movants assign to it. As an initial matter, Movants fail to present–and the Court fails to find–any authority for the proposition that the "consent in writing" requirement applies in arbitration proceedings. This absence of authority, taken alone, weakens Movants' argument that the arbitrator disregarded a clear governing principle of law. In addition, the language of the FLSA itself lacks the clarity which Movants would read into it. While § 16(b) does mandate the use of an opt-in procedure in class actions, it speaks of those actions and the written consent of class members being filed in "court[s] of competent jurisdiction." Although the statutory reference to "court[s]" does not entirely foreclose the possibility that the statute's requirements might apply in arbitration, it supplies uncertainty to the question of whether Congress intended the consent in writing requirement to govern arbitration proceedings as well as actions in court. In the face of the uncertainty of the statute's reach and the lack of interpretative authority on point, the Court cannot say that a clear principle of law bound the arbitrator in this case.

Even if FLSA § 16(b) qualifies as a clearly established principle requiring the use of opt-in classes in arbitration, the arbitrator did not disregard or ignore the statute in making his class determination award. Indeed, the arbitrator explicitly referred to § 16(b) in his award and balanced Movants' argument that the statute requires an opt-in class against Respondents' position that the arbitration agreement incorporates AAA rules providing for an opt-out class. (Mov. Mem. Supp. M. Vac. Ex. 1 at 4-11.) Further, the arbitrator specifically noted Movants' argument that the consent in writing requirement is a substantive right and referenced Supreme Court precedent which rec-

onciles the need to preserve substantive statutory rights with the necessity that parties be held to their agreements to arbitrate. *Id.* at 8 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). The arbitrator then went on to find that Congress had not "evinced an intention to preclude a waiver" of the judicial remedies and procedures provided in § 16(b) (as is required before those remedies become non-waivable in arbitration). *Id.* Then, he analyzed the "salutary objectives" of the FLSA and to note that the FLSA permits states and localities to adopt higher standards than the federal standards of the Act. *Id.* at 9. The arbitrator also found instructive the Federal Arbitration Act's (FAA) preference for procedural rules adopted by the parties to an arbitration agreement. *Id.* Finally, the arbitrator noted that Movants' earlier attempt to classify as procedural and waivable that portion of § 16(b) which provides for collective actions weakens Movants' argument that § 16(b)'s written consent requirement is substantive and non-waivable. *Id.* at 10-11. After conducting this analysis, the arbitrator ruled that the class opt-in procedures of § 16(b) do not apply in private arbitration proceedings when the arbitration agreement and AAA rules provide for an opt-out class.

In sum, the arbitrator rendered a reasoned award which, far from ignoring the applicability of the FLSA, thoroughly analyzed the relationship of FLSA § 16(b) and the arbitration agreement. That the Court may have reached a different conclusion–or even that the arbitrator may have made a serious error of law–is of no consequence. *Remmey*, 32 F.3d at 149 (noting that vacatur is not justified by a court's belief that an arbitrator misapplied the law); *Upshur Coals Corp. v. United Mine Workers District*

31, 933 F.2d 225, 229 (4th Cir. 1991) ("An arbitration award is enforceable even if the award resulted from a misinterpretation of law, faulty legal reasoning, or erroneous legal conclusion.") (internal quotation marks omitted); 1 *Domke on Comm. Arb.* § 38:9 (2002) ("An arbitration award will not be overturned for manifest disregard of the law even where the arbitrator makes a serious error in his understanding of the law or in applying the law."). Movants and Respondents had a full and fair opportunity to present their competing views of the relevance of FLSA § 16(b) to the arbitration proceedings. The arbitrator, faced with "substantial conflicting" interpretations of the FLSA "which could support a decision for either of the parties," rendered his award. *Remmey*, 32 F.3d at 150. As a result, the Court "cannot simply assume that [he] ignored the law in reaching [his] conclusions." *Id.*; *see also Mountaineer Gas*, 76 F.3d at 608.

B. Scope of Arbitrator's Authority

Movants next contend that the arbitral award should be vacated because the arbitrator exceeded the scope of his powers in rendering the award. Although the FAA provides courts with the authority to vacate an award on this ground, 9 U.S.C. § 10(a)(4), the courts exercise that authority in a limited fashion. Indeed, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," courts should refrain from vacating his decision. *Am. Postal Workers Union*, 204 F.3d at 527. Moreover, the Court of Appeals has emphasized that courts should vacate an arbitrator's decision as exceeding the scope of his authority only when the arbitrator "dispense[s] his own brand of industrial justice[,]" *id.* (citing *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*,

363 U.S. 593, 597 (1960)), "ignores the unambiguous language [of the contract] chosen by the parties," *id.* (citing *Mountaineer Gas*, 76 F.3 d at 610), or "base[s] his award on his own personal notions of right and wrong," *Island Creek Coal Co. v. Dist. 28, United Mine Workers of Am.*, 29 F.3d 126, 129 (4th Cir. 1994) (citing *Upshur Coals*, 933 F.2d at 229).

Here, Movants assert that the arbitrator exceeded his powers by certifying an opt-out class despite language in the arbitration agreement which provides that an employee is entitled to "anything [he] might seek through a court of law" and that the arbitrator "shall apply the substantive law ... in the state in which the claim arose, or federal law, or both ...." (Mov. Mem. Supp. M. Vac. 19.) Movants also contend that the arbitrator ignored an AAA rule which requires the arbitrator to "consider ... any law ... the arbitrator determines applies to the arbitration." *Id.* Thus, Movants argue, in ignoring these provisions of the arbitration agreement, the arbitrator rewrote the agreement and exceeded his authority.

The Court finds this argument unpersuasive. The arbitrator's decision to certify an opt-out class was essentially a matter of contract interpretation. As the arbitrator noted:

> The issue is whether the agreement of the parties which incorporates the Supplementary [AAA] Rules dictates an opt-out procedure pursuant to the Rule 23 model or whether Plaintiffs' reliance upon the substantive provisions of the FLSA compels adherence to FLSA procedural rules, particularly the opt-in provisions of rule 16(b).

(Mov. Mem. Supp. M. Vac. Ex. 1 at 5.) The arbitrator further emphasized that he was merely interpreting the parties' arbitration agreement when he framed the question before him as "whether the parties' contract has superseded the FLSA's procedural requirements." *Id.* at 6.

The arbitrator was certainly correct in this view of his role in the instant dispute. Far from ignoring any unambiguous language of the arbitration agreement mandating the certification of an opt-in class based on § 16(b)'s requirements, the arbitrator was forced to interpret the agreement *because of* its ambiguity as to whether § 16(b) or the AAA rules would apply to class certification. In doing so, the arbitrator did not dispense his own brand of justice but simply determined that the parties' agreement favored the use of an opt-out class under the AAA rules rather than an opt-in class under § 16(b). Nor did the arbitrator create a new remedy for Respondents, as Movants suggest. Instead, the arbitrator did what he was supposed to do: he analyzed two conflicting interpretations of the arbitration agreement and made a reasoned decision as to why an opt-out class should be certified.

Movants' suggestion that the arbitrator exceeded the scope of his authority by injecting his own personal notions of right and wrong into the adjudicative process must also be rejected. Despite his statement that "[e]quity is better served" by certifying an opt-out class, (Mov. Mem. Supp. M. Vac. Ex. 1 at 11), the arbitrator did not exceed the bounds of his authority under the arbitration agreement. First, the arbitrator's reference to "equity" implies that he invoked equitable principles developed in caselaw (an implication which is supported by the arbitrator's ci-

tation to authority in support of his use of equity) rather than any personal view of right and wrong.[2] Second, the arbitration agreement undoubtedly gave the arbitrator authority to invoke equity, as it provided him with the power to award any relief which a court could award. The arbitrator, therefore, acted–or at least arguably acted–within the scope of his authority when he noted that equity supports the certification of an opt-out class.

Finally, even if Respondents have–at the very most–raised an arguable issue as to whether the arbitrator exceeded the scope of his powers, the Court is without authority to vacate the arbitrator's decision. *Am. Postal Workers Union*, 204 F.3d at 527 (holding that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," a court should not vacate his decision). Therefore, the Court cannot say that the arbitrator exceeded the scope of his authority.[3]

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[2] The arbitrator's reference to "fairness, efficiency, and due process," (Mov. Mem. Supp. M. Vac. Ex. 1 at 9), also indicates that, in using the term "equity," he referred to more than mere personal belief in a just result.

[3] The Court also rejects Movants' argument that the arbitrator exceeded the scope of his powers by applying the stay and tolling agreement entered in *Johnson v. Long John Silver's Restaurants, Inc.*, 320 F.Supp.2d 656 (M.D. Tenn. 2004). In essence, Movants maintain that the arbitrator exceeded the scope of his authority by applying the wrong statute of limitations to the instant case. A legal or interpretative error by the arbitrator, however, does not equate to an expansion of his powers beyond those delegated to him in the arbitration agreement. The issue of the applicability of the *Johnson* stay to the present arbitration proceedings was clearly before the arbitrator, as Movants themselves requested a ruling on this issue. Thus, the

V. CONCLUSION

Based on the foregoing, and after a thorough review of the record and the relevant law, the Court concludes that the motion to vacate the arbitrator's class determination award must be, and hereby is, **DENIED**. All other pending motions are hereby rendered **MOOT**.

IT IS SO ORDERED.

Signed this 20th day of January, 2006, in Spartanburg, South Carolina.

/s/ Henry F. Floyd
HENRY F. FLOYD
UNITED STATES DISTRICT JUDGE

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arbitrator's ruling that the *Johnson* tolling agreement applied here clearly fell within the scope of his authority.

APPENDIX C

AMERICAN ARBITRATION ASSOCIATION
EMPLOYMENT AND CLASS ACTION ARBITRATION TRIBUNAL

ERIN COLE, NICK KAUFMAN, AND VICTORIA McWHORTER, on behalf of themselves and on behalf of all other members of the general public similarly situated,

Plaintiffs,

vs.

LONG JOHN SILVER'S RESTAURANTS, INC., AND LONG JOHN SILVER'S, INC.,

Defendants.

AAA CASE 11 160 00194 04

CLASS DETERMINATION PARTIAL FINAL AWARD

Plaintiffs' Motion for Class Certification prays the Arbitrator:

1. To certify the above-captioned action as a class action.

2. To certify an opt-out class of persons pursuant to Rule 4 of the American Arbitration Association's ("AAA") Supplementary Rules for Class Arbitrations, defined as follows:

> "All salaried restaurant managers in the United States who are presently employed or who were formerly employed by defendants ("LJS") from December 17, 1998 through August 22, 2004."

3. To certify Plaintiffs Erin Cole, Nick Kaufman and Victoria McWhorter as representatives of the Class, and their counsel of record, Stewart, Estes & Donnell, as counsel for the Class pursuant to Class Arbitration Rule 5(b).

4. To direct that notice issue to the Class pursuant to Class Arbitration Rule 6, and to require Defendants to pay the cost of providing notice to the Class.

On or about June 15, 2004 the Clause Construction Award determined that the parties' employment contract "cannot be construed as prohibiting a class or collective action under the FLSA ... "Pursuant to Rule 3 of the Supplementary Rules for Class Arbitrations (hereinafter Supplementary Rules), all proceedings were stayed to permit either party 'to move a court of competent jurisdiction to confirm or vacate' the Award." Defendants did move the United States District Court to vacate the award, but in the intervening year there has been no response from the Court.

Plaintiffs' Motions for Class Certification was filed on March 4, 2005. Prior to the adjudication of class certification, Defendants sought the adjudication of three preliminary matters. The first is whether the class determination phase should proceed under the procedural requirements set forth in FLSA section 16(b) (specifically the "opt-in" requirements) or the Rule 23-type provisions prescribed in the AAA Supplementary Rules. Second, Defendants seek a ruling on whether the Stay and Tolling Agreement (hereinafter "STA") entered in the case of Johnson vs. Long John Silver's, Inc., case No. 3-01-1526, U.S. District Court for the Middle District of Tennessee (hereinafter "Johnson") applies to this ar-

bitration. Third, Defendants seek a ruling as to whether the class determination phase is limited to class members employed in South Carolina or whether the class determination applies nationwide.

Plaintiffs objected to "taking up substantive issues before resolution of the class certification issue ..." Because the issues raised by Defendants have a direct impact upon the class certification issues (for example, because notice to a prospective class will be determined by 'parameters and identity' of the class), it was determined to decide these issues as part of an "omnibus" Class Certification Hearing. It was also thought that because the Class Certification Award is also subject to a minimum 30-day stay to permit a motion in court "to confirm or vacate" the Award, a determination of all related issues might attenuate somewhat the piecemeal adjudication which has characterized this litigation.

I.

Defendants assert that because Plaintiffs are seeking the substantive benefits of the FLSA, they are bound to the procedural requirements of that statute, particularly the "opt-in" provisions of section 16(b). Plaintiffs respond that by their Private Employment Contract, the parties have agreed to the AAA Supplementary Rules, which incorporate Rule 23 as the appropriate procedural guideline.

Defendants point to the requirement of Rule 4(a) that the Arbitrator "shall consider the circumstances enumerated in Rule 4 and any law or agreement of the parties the Arbitrator determines applies to the arbitration." Defendants' brief emphasizes "shall consider" and "any law", urging the Arbitrator to "deter" to FLSA's procedural requirements.

Although the language of Rule 4(a) relied upon by Defendants is advanced for the "purpose" of determining "whether a class action may be maintained," the rule does provide a focus for inquiry. Defendants emphasize the "law" to be considered. Rule 4(a), however, also requires the consideration of any "agreement of the parties."

The issue is whether the agreement of the parties which incorporates the Supplementary Rules dictates an opt-out procedure pursuant to the Rule 23 model or whether Plaintiffs' reliance upon the substantive provisions of the FLSA compels adherence to FLSA procedural rules, particularly the opt-in provisions of rule 16(b).

Were Plaintiffs' claims not tethered to a particular statute, it is clear that the opt-out provisions of Rule 23 would obtain. As noted in Hyper-Touch, Inc. vs. the Superior Court of San Mateo County, (2005) 128 Cal.App.4th 1527.

> "It is not clear that anyone's interests are protected by imposition of the duty to 'opt in' prior to the establishment of liability. Requiring plaintiffs to affirmatively 'opt in' will inevitably -- and sometimes significantly -- reduce the size of the class, and may therefore be seen as simply 'another device by which a defendant could 'clip away at the size of the class through exclusion of unnamed plaintiffs'" (citations omitted). At the same time, reducing the class to those who acknowledge receipt of actual notice by 'opting in' is not necessarily in the interest of defendants, because it reduces the *res judicata* effect of a judgment for the defendant and opens the door to a great deal of redundant litigation,

particularly where some members of the class may have a substantial stake."

Defendants invite the Arbitrator to "defer" to the procedural requirements of the FLSA as would "a federal judge applying the Federal Rules of Civil Procedure." This begs the question as to whether the parties' contract has superseded the FLSA's procedural requirements. If the agreement of the parties prevails, then the Rule 23 model applies. Supplementary Rule 5(c) provides that the "Class Determination Award shall state when and, how members of the class may be excluded from the class arbitration." Rule 6 provides "the notice of class determination must ... state ... that the Arbitrator will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded. Supplementary Rule 7 provides "the final award shall . . describe those who have elected to opt out of the class." The language of exclusion infers the application of Rule 23.

The choice between an opt-in and an opt-out procedure is not abstract. The significant decline in the number of probable class members has been noted. Defendants also seek the benefit of a much more restrictive statute of limitations, which would also severely limit the class.

In view of these consequences, some attention must be paid to the context of the controversy. Plaintiffs originally sought to advance their FLSA claim as a collective action in federal court (the Johnson case). Defendants successfully sought the preemption of those claims by invocation of those provisions of the employment contract which compelled the private arbitration of the parties' disputes within the framework of the Supplementary Rules. It was De-

fendants who sought the avoidance of the FLSA procedures by the substitution of AAA procedures. Having succeeded in accomplishing a private litigation unmoored from federal procedural rules, the claim for a necessary adherence to the FLSA procedural rules is unpersuasive. Indeed, the judicial preference for the opt-out procedure is so universal that absent compelling authority requiring adherence to the opt-in procedure, there would be no inclination whatsoever to engraft that procedure upon a private arbitration. No such compelling authority has been presented.

It has been noted that "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial forum (citations omitted)." Gilmer vs. Interstate/Johnson Lane Corporation, (1991) 500 U.S. 20, 26. Further, "having made the bargain to arbitrate, the parties should be held to it unless Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Ibid.* Here, there is no evidence of any congressional intent which would impose an opt-in provision upon a class action being privately arbitrated, where the consequence would be to limit the population of intended beneficiaries of the statute.

In federal court, Defendants have sought to employ the arbitration procedure set forth in the employment contract as a device for precluding the collective action procedure of FLSA section 16(b). Plaintiffs here assert the same employment contract as a basis for proceeding pursuant to AAA's Rule 23 procedure. Both Defendants and Plaintiffs are correct that the Arbitration Agreement and Supplementary

Rules define the rights of the parties. Here, the contractual preference for a Rule 23 opt-out requirement is dispositive.

If fairness, efficiency and due process applicable to the widest appropriate class be the criteria for determination, then the Supplementary Rules as incorporated into the parties' employment agreement must prevail over the disfavored opt-in provisions espoused by Defendants. The salutary objective of the FLSA are advanced by the opt-out procedure. Generally, "the FLSA permits states to adopt higher standards than those established in the Act and preempts state law in this area only to the extent that state laws are less generous than the FLSA)." City of Sidell, 25 Fed.Supp.2d, 727, 728 (E.D. LA 1998). 29 U.S.C. section 218(a) expressly authorizes states and municipalities to enact more favorable wage and hour legislation than that encompassed by FLSA. By analogy, it would seem that the parties to a private employment contract could similarly accede to a procedural mechanism that is more inclusive in making available the substantive benefits of the FLSA.

The preference for the procedural rules defined by private contract is a basic objective of the FAA as well. "Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreement as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted." Volt Information CSCI, Inc. vs. Board of Trustees, 489 U.S., 468 (1989) at page 479.

Had this case been permitted to proceed as a collective action in Johnson, these issues would not have arisen. By invoking their contractual rights, the

parties have submitted to the procedural requirements of the contract. Critically, the pretrial maneuverings in Johnson and this arbitration have resulted in protracted delays which would now create a fundamental unfairness by the opt-in procedure which, as noted, would significantly reduce the class population in derogation of fundamental FLSA objectives.

Defendants' ultimate objective, of course, would have been a preclusion of any but individually adjudicated claims. But for Green Tree Financial Corp. vs. Bazzle, 539 U.S. 444 (2003) and the development of case law disfavoring the use of adhesive employment contracts as a mechanism for precluding class or collective actions, the strategy might have been (and ultimately still might be) successful. Defendants now complain that plaintiffs are "requesting that the Arbitrator revive stale claims without any reasoned, real or equitable basis." To the contrary, it has been the endless procedural machinations first in Johnson and now in this arbitration which have acted to jeopardize numerous potentially legitimate claims. To some extent, it is the very procedural history of this case which has rendered ineffective the opt-in procedures of the FLSA. Equity is better served by preserving the rights of potential claimants who have been "sidelined" during the progress of this case. (See Advanced Micro Devices, Inc. vs. Intel Corp., (1994) 9 Cal.4th 362, 374-375.

II.

Throughout these proceedings, plaintiffs have expressed their reliance upon a Stay and Tolling Agreement (STA) which was entered in the Johnson case. Defendants urge that the STA applies only to those who were formal parties in the Johnson case

and is not applicable to this arbitration. The purpose of the STA was to "facilitate" settlement negotiations on a class-wide basis.

Each side avers the STA in Johnson must be interpreted in accordance with its terms and without resort to extrinsic evidence. Defendant's search for certainty focuses upon the first sentence of the STA: "This stipulation ... is entered into ... by and between Kevin Johnson ("Johnson") on behalf of himself and all putative class members in this action and Long John Silver's, Inc. ..." Defendants' brief italicizes and relies upon the words "in this action" urging that "this unambiguous contractual language clearly limits the applicability of the STA to the Johnson action." Plaintiffs' brief italicizes "all putative class members in this action". Were this simply a battle of italics, resort to extrinsic evidence might indeed be required to unearth the parties' mutual intentions.

Within the context of the Johnson negotiations for a class-wide resolution of the dispute through mediation and recognizing that each side during the pretrial phase of Johnson was seeking, for their own respective benefit, an arbitral option to the Johnson proceedings, it is the additional language of the STA which demands attention.

The introductory paragraph acknowledges the parties' intention to "preserve the status quo while they attempt to negotiate a settlement on a class-wide basis." Paragraph one of the actual stipulation provides that "this action will be stayed pending settlement negotiations ..."

Paragraph two provides:

> "The statute of limitations for the claims asserted in the complaint on behalf of Johnson and members of the putative class (which Plaintiffs define as any present and/or former employee of LJS who now works and/or formerly worked as a salaried restaurant manager for LJS from November 26, 1998 forward, and who was classified as an exempt Restaurant and/or Assistant Restaurant General Manager (or salaried/exempt employee who performs or performed similar jobs, however titled or classified)) is tolled from December 17, 2002 until 30 days after the date of the notice of termination of settlement negotiations ..."

Paragraph two advances two purposes of the STA. The first is to toll the statue of limitations as described. The second is to define precisely the members of the putative class as to whom the tolling agreement applies. The definition is clear and unambiguous. It embraces a specifically classified group of employees.

Paragraph five confirms that resolution of Plaintiffs' claims by arbitration was a "defense" being advanced by Defendants, and that Defendants were not waiving their objections to Plaintiffs' proceeding as a "class or collective action." In that context, paragraph five provided "that LJS may not assert a limitations defense with respect to the tolling against any member of the putative class that's defined by Plaintiffs in paragraph two above."

Finally, Judge Wiseman's opinion in Johnson, adopted in toto by the Sixth Circuit in Johnson vs. Long John Silver's Restaurants, Inc., 414 F.3d 583, 660 (2005) noted that "... the Magistrate Judge con-

cluded that the Court would not take up any issues regarding court supervised notice to class members until the arbitration issue had been resolved, reasoning that no prejudice to the class would result because of the tolling agreement." The reference to tolling applied to that class to whom notice would be required, namely that putative class referred to in paragraph two of the STA. Presumably the Magistrate Judge did not intend that the tolling agreement would obtain if Plaintiffs were successful in having the matter adjudicated in federal court, but would evaporate if the case proceeded as an arbitration. The concern of the Magistrate Judge centered upon potential prejudice to the class, not upon the forum of ultimate adjudication.

Without the necessity for extrinsic evidence, it is determined that in this arbitration, any claims asserted in the Johnson complaint on behalf of the described putative class are tolled by the STA. The result would not be different based upon a consideration of the extrinsic evidence adduced by either side.

III.

A third preliminary contention of Defendants is that the scope of any class action must be limited to persons employed by LJS in South Carolina. "Such a limitation is necessary to avoid conflicts between materially different versions of the Dispute Resolution Program" existing in different states and locales and further because the Clause Construction Award authorizing a class action was "rooted in South Carolina law," where other jurisdictions, notably Oklahoma, might have reached different determinations (Respondents' Opposition Brief, page 46).

Defendants further urge that the post-May 2001 versions of the Real Solution Program provide for an arbitration venue "in or near the community where you live," a condition difficult to achieve for class members living outside South Carolina.

That the Clause Construction Award was based upon the South Carolina version of the Dispute Resolution Program is a fortuity based upon Plaintiffs' choice of forum. It had been represented, however, that the various iterations of the agreement were not different in significant particulars. As to the convenience factor, it is not necessarily to be anticipated that class members would be attending arbitration proceedings, and the right to opt out should satisfy any individual concerns regarding convenience. Finally, the "representative proof model" of the sort espoused in Anderson vs. Mount Clemens Pottery Company, 328 U.S. 680 (1946), and Bell vs. Farmers Ins. Exchange, 115 Cal.App.4th 715, should attenuate any problems of individual participation.

Defendants do not suggest that the policies and practices of LJS here at issue are unique to South Carolina or are significantly at variance in different states. Nor do Defendants invoke any significant dissimilarity among the various employment contracts as relevant to the instant case. Apart from the reference to Turpin vs. Cross Country Bank, (WD Okla., April 4th, 2001), an unpublished trial court decision which antedated Green Tree Financial Corp. vs. Bazzle, 539 U.S. 444 (2003), Defendants have adduced no authority suggesting state law conflicts which would impact a nationwide class action.

Nothing in the Clause Construction Award nor in the facts adduced in this proceeding has provided any persuasive rationale for limiting the putative

class to those residing or employed in South Carolina.

IV.

Having determined that the opt-in procedures of the FLSA and Rule 23 are irreconcilable, that the terms of the Arbitration Agreement dictate adherence to Rule 23 and that the procedural history of this litigation, commencing with Johnson, has resulted in circumstances which would significantly prejudice the putative class were FLSA Section 16(b) to be employed, this opinion must now address those "prerequisites to a class arbitration" or class certification required by Rule 4 of the Supplementary Rules.

Defendants invite a threshold inquiry into the nature of the factual analysis required as a prerequisite to certification. Defendants urge that the Arbitrator "must look beyond the class-action pleadings" and "vigorously" examine the factual bases asserted in support of class certification. In contrast, plaintiffs argue that "decision-makers may not conduct a preliminary hearing into the merits in order to determine whether a suit should be maintained as a class action." (Plaintiffs' Reply Memorandum, page 53, 54).

Plaintiffs rely upon Blackie vs. Barrack, 524 F.2d 891, 901 N.17 (9th Cir. 1975) for the proposition that "the court is bound to take the substantive allegations as true ... " omitting reference to that part of the footnote requiring the court to "require sufficient information to form a reasonable judgment."

Defendants rely upon Johnson vs. HBO Film Management, Inc., 265 F.3d 178 (2001). Johnson was a fraudulent marketing case where it was held "appropriate to look beyond the Plaintiff's pleadings that

alleged the Defendants made uniform oral and written misrepresentations and determine whether the record supported their claims." Johnson, supra, page 186. In Johnson, plaintiffs alleged that defendant had made "uniform oral and written misrepresentations" and that the prospectus itself was "evidence of a uniform written misrepresentation made to all plaintiffs." From the "well-developed record," the trial court's ruling was upheld that there was, in fact, no uniformity or standardization of representations employed in soliciting customers and that such an action "based substantially on oral rather than written conversations is inappropriate for treatment as a class action." Johnson, page 190. As in Johnson, here the issue of the extent of pre-certification factual inquiry dovetails somewhat with the issue of predominance pursuant to Rule 23(b) (3) and Supplementary Rule 4(b).

Defendants argue that:

1. Any individual claim "would necessarily involve a highly individualized inquiry into actions taken contrary to the plain language of LJS policy" (Defendants' Opposition Brief, page 2);

2. "The Arbitrator will not be able to rule that LJS policy is per se unlawful under FLSA or that an illegal company-wide practice was applied nationwide throughout all LJS restaurants ..." (Defendants' Opposition Brief, page 16);

3. Pursuant to LJS policy, individual employees expressly authorized restitution on a case-by-case basis and only after an investigation, not as a condition of employment ..." (Defendants' Opposition Brief, page 17);

4. Individual employees "made restitution voluntarily" and only "in lieu of alternative recovery options such as recourse to local law enforcement ..." (Defendants' Opposition Brief, page 17);

5. "Any alleged violation of the FLSA salary basis test resulted from ..." a misinterpretation or unauthorized application of LJS policy ..." (Defendants' Opposition Brief, page 22).

Plaintiffs focus the inquiry more precisely upon the stated policy of LJS with respect to reimbursements from salary and the application of FLSA requirements to that policy. According to plaintiffs, the salary basis regulation set forth in 29 CFR Section 541.118 requires that an exempt employee be paid "a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." Plaintiffs urge that "disciplinary reductions in pay, other than for violations of major safety rules, constitute reductions in pay based on the quality and quantity of an employee's work." Shockley vs. City of Newport News, 997 F.2d 18, 25 (4th Cir. 1993). Further, "employees whose compensation is subject to reduction based on a violation of any other rules are ordinarily considered nonsalaried and are entitled to overtime." Hurley vs. State of Oregon, 27 F.3d 392, 394 (9th Cir. 1994).

From the pleadings and from the declarations submitted, it is concluded that there are predominant legal issues which may be framed and adjudicated without the necessity for extended inquiry into individual cases. It is the LJS reimbursement policy as promulgated which, if established by the evidence, invokes the imposition of the FLSA rules and regulations, regardless of individual application in various

stores and locales. It is the potential for impermissible deductions from an employee's "salary" which contravenes the FLSA's "salary basis test." Hurley vs. Oregon, supra; Kinney vs. District of Columbia, 994 F.2d 6, 11 (D.C. Cir. 1993); Balgowan vs. New Jersey Department of Transportation, 84 F.3d 656 (3d Cir. 1996); Shockley vs. Newport News, supra. Whether any individual employee has actually suffered a reduction in pay need not alter his or her status as an exempt or nonexempt employee.

In Auer vs. Robbins, 519 U.C. 452 (1997), the Supreme Court recognized the "broad authority" of the Secretary of Labor to "define and delimit" the scope of any exemption from executive, administrative, or professional employees. "Under the Secretary's chosen approach, exempt status requires that the employee be paid on a salary basis which in turn requires that his compensation not be subject to reduction because of variations in the 'quality or quantity of the work performed.'" Auer, supra, page 456. Auer articulates a "primary issue" as to whether "an employee's pay is 'subject to' disciplinary or other deductions whenever there exists a theoretical possibility of such deductions, or rather only when there is something more to suggest that the employee is actually vulnerable to having his pay reduced." Auer, supra, page 459. According to Auer, the Secretary of Labor "interprets the salary basis test to deny exempt status when employees are covered by a policy that permits disciplinary or other deductions in pay 'as a practical matter.' That standard is met, the Secretary says, if there is either an actual practice of making such deductions or an employment policy that creates a 'significant likelihood' of such deductions." Auer, supra, page 461.

However that "primary issue" might be resolved in this arbitration, the record suggests that the policy of LJS as to whether employees in general were vulnerable to salary reductions will emerge without the necessity of adjudicating more than a representative sample of disputed cases.

Defendants' argument that an individual employee is not precluded from "voluntarily agreeing to reimbursement" is not persuasive. "Voluntarily" acceding to a reduction in salary as an alternative to "recourse to local law enforcement" scarcely meets the test of voluntariness in any context whether civil or criminal. In any event, "to allow waiver of statutory wages by agreement would nullify the purposes of [the FLSA]." Brooklyn Sav. Bank vs. O'Neil, 324 U.S. 697 (1945).

V.

On the related issues of pre-certification fact ascertainment and predominance of issues, Sav-On Drug Stores, Inc. vs. Superior Court, (2004) 34 Cal.4th 319, provides a pragmatic guide. The issue in Sav-On was the alleged misclassification of employees as managerial and exempt. Plaintiffs urged that employee work responsibilities were "standardized" throughout the Sav-On chain. Defendants urged significant variance based upon multiple factors ("store location and size, physical layout, sales volume, hours of operation, management structure and style, experience level of managers and number of hourly employees requiring supervision.") Sav-On, supra, page 325. Defendants argued that "no meaningful generalizations about the employment circumstances of its managers could be made."

The California Supreme Court upheld the trial court's determination that certification was appropriate, holding that "the record contains substantial, if disputed, evidence that deliberate misclassification was defendant's policy and practice." Sav-On, supra, page 329. Sav-On held that certification would not preclude defendant from demonstrating wide variations in the situations of various employees. Nonetheless, the predominant issue remained as to whether there was a uniform classification policy put into practice under standardized conditions. Sav-On, page 202. "Preponderance," notes the Supreme Court, "is a comparative concept and 'the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate (citations omitted)'" Sav-On, supra, page 334). The necessity for "individualized proof" as to certain of the "central issues" pertaining to classification does not bar certification on preponderance grounds. Sav-On, supra, page 334.

Plaintiffs correctly note the importance of post-certification discovery in determining the application and scope of LJS's relevant policies. Even without extended discovery and based upon the record presented, it is concluded that Plaintiffs have met their burden of establishing a "well-defined community of interest among class members (citations omitted)" embodying predominant common questions of law and fact and class representatives with claims and defenses typical of the class. Sav-On, supra, page 326.

Defendants contend Plaintiffs have failed to meet the numerosity test because not all RGM's and ARGM's were subject to a "facially invalid" or "unfair practice" and that there are "only isolated, highly in-

dividualized incidents" of improper deductions. Again, it is not the fact of actual deductions so much as the policy of reimbursement that is determinative. The parties' stipulation suggests a class of fewer than 3,000 employees. That number is sufficiently large to embrace the benefits of a class action yet not so large there are insuperable burdens of notice or administration.

Defendants make the same argument from individualized circumstances in support of their contention that the requirement of typicality is not sustained. Here, Plaintiffs' claims arise from the same provisions of the employment contracts and invoke the same legal theories of recovery. "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met regardless of varying fact patterns which underlie individual claims." 7 Newberg on Class Actions, section 3.13 (4th Edition, 2002). Here, the typicality condition is easily realized.

From the foregoing discussion, it may be concluded that there are "questions of law or fact common to the class," and further "that the questions of law or fact common to members of the class predominate over any questions affecting only individual members."

Defendants' objection to the adequacy of the representative parties primarily derives from its view that the individual claims of Kaufman and Cole are barred by the statute of limitations. That issue was addressed above. There is no evidence or suggestion that the named Plaintiffs' interests are antagonistic to the class, or that there is any collusive relationship. Similarly, counsel for Plaintiffs have demon-

strated a capable devotion to the prosecution of this case that satisfies the requirements of Rule 4(a)(5).

Finally, Defendants urge that Plaintiffs have failed to show that a class action is superior to thousands of individual actions. Defendants' concern is that the scrutiny of each alleged salary reduction would create countless "mini proceedings" and that certification would preclude Defendants' right to individual defenses. Again, the facts of a particular employee's salary reductions do not address Plaintiffs' theory that it is the potential for reduction that alters the employee's exempt status within FLSA. In any event, "a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of damages." Sav-On, supra, page 204. Nor does certification attenuate the entitlement of Defendants to defend against Plaintiffs' complaint by demonstrating wide variations in the individual circumstances of various employees. Sav-On, supra, page 330. Whatever the management problems of a class action, however, the opportunity collectively to adjudicate central issues of law and fact in a single proceeding without conflicting decisions outweighs the specter of 3,000 separate trials. With any modicum of cooperation, it may be possible to resolve the entirety of the case, in favor of one side or the other, by adjudicating those central issues from which the individual variations flow.

Based upon the foregoing, the Arbitrator finds that all of the prerequisites for a class arbitration set forth in Rules 4(a) and (b) of the Supplementary Rules have been satisfied and that this arbitration shall proceed as a class arbitration.

In accordance with Rule 5(a), this is a partial final award. Pursuant to Rule 5(d), all proceedings are stayed for a period of 90 days to permit either party to move a court of competent jurisdiction to confirm or vacate this award.

Rules 5(b) and (c) anticipate that a proposed Notice of Class Determination be attached to the award. The nature of the issues presented (particularly those relating to tolling and opt-in/opt-out) has precluded counsel from realistically addressing the notice issues prior to the issuance of this award. The parties are ordered to meet and confer regarding the resolution of any issues pertaining to notice and to agree, if necessary, to a schedule of briefing and hearing. The stay provision shall not affect the resolution of issues relating to notice.

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Date: September 19, 2005

/s/
HON. RICHARD A. HODGE (Ret.)
ARBITRATOR

I, RICHARD A. HODGE, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Class Determination Partial Final Award.

Date: September 19, 2005

/s/
HON. RICHARD A. HODGE (Ret.)
ARBITRATOR

APPENDIX D

SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS*

EFFECTIVE DATE OCTOBER 8, 2003

RULE

1. Applicability
2. Class Arbitration Roster and Number of Arbitrators
3. Construction of the Arbitration Clause
4. Class Certification
5. Class Determination Award
6. Notice of Class Determination
7. Final Award [omitted]
8. Settlement, Voluntary Dismissal, or Compromise [omitted]
9. Confidentiality; Class Arbitration Docket [omitted]
10. Form and Publication of Awards [omitted]
11. Administrative Fees and Suspension for Nonpayment [omitted]
12. Applications to Court and Exclusion of Liability [omitted]

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* These rules are available at http://www.adr.org/sp.asp?id=21936, and are reproduced here for the convenience of the Court.

1. Applicability

(a) These Supplementary Rules for Class Arbitrations ("Supplementary Rules") shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association ("AAA") where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules. These Supplementary Rules shall also apply whenever a court refers a matter pleaded as a class action to the AAA for administration, or when a party to a pending AAA arbitration asserts new claims on behalf of or against a class or purported class.

(b) Where inconsistencies exist between these Supplementary Rules and other AAA rules that apply to the dispute, these Supplementary Rules will govern. The arbitrator shall have the authority to resolve any inconsistency between any agreement of the parties and these Supplementary Rules, and in doing so shall endeavor to avoid any prejudice to the interests of absent members of a class or purported class.

(c) Whenever a court has, by order, addressed and resolved any matter that would otherwise be decided by an arbitrator under these Supplementary Rules, the arbitrator shall follow the order of the court.

2. Class Arbitration Roster and Number of Arbitrators

(a) In any arbitration conducted pursuant to these Supplementary Rules, at least one of the

arbitrators shall be appointed from the AAA's national roster of class arbitration arbitrators.

(b) If the parties cannot agree upon the number of arbitrators to be appointed, the dispute shall be heard by a sole arbitrator unless the AAA, in its discretion, directs that three arbitrators be appointed. As used in these Supplementary Rules, the term "arbitrator" includes both one and three arbitrators.

3. Construction of the Arbitration Clause

Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award"). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Clause Construction Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.

In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these

Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.

4. Class Certification

(a) Prerequisites to a Class Arbitration

If the arbitrator is satisfied that the arbitration clause permits the arbitration to proceed as a class arbitration, as provided in Rule 3, or where a court has ordered that an arbitrator determine whether a class arbitration may be maintained, the arbitrator shall determine whether the arbitration should proceed as a class arbitration. For that purpose, the arbitrator shall consider the criteria enumerated in this Rule 4 and any law or agreement of the parties the arbitrator determines applies to the arbitration. In doing so, the arbitrator shall determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described. The arbitrator shall permit a representative to do so only if each of the following conditions is met:

(1) the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately protect the interests of the class;

(5) counsel selected to represent the class will fairly and adequately protect the interests of the class; and

(6) each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.

(b) Class Arbitrations Maintainable

An arbitration may be maintained as a class arbitration if the prerequisites of subdivision (a) are satisfied, and in addition, the arbitrator finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(1) the interest of members of the class in individually controlling the prosecution or defense of separate arbitrations;

(2) the extent and nature of any other proceedings concerning the controversy already commenced by or against members of the class;

(3) the desirability or undesirability of concentrating the determination of the claims in a single arbitral forum; and

(4) the difficulties likely to be encountered in the management of a class arbitration.

5. Class Determination Award

(a) The arbitrator's determination concerning whether an arbitration should proceed as a

class arbitration shall be set forth in a reasoned, partial final award (the "Class Determination Award"), which shall address each of the matters set forth in Rule 4.

(b) A Class Determination Award certifying a class arbitration shall define the class, identify the class representative(s) and counsel, and shall set forth the class claims, issues, or defenses. A copy of the proposed Notice of Class Determination (see Rule 6), specifying the intended mode of delivery of the Notice to the class members, shall be attached to the award.

(c) The Class Determination Award shall state when and how members of the class may be excluded from the class arbitration. If an arbitrator concludes that some exceptional circumstance, such as the need to resolve claims seeking injunctive relief or claims to a limited fund, makes it inappropriate to allow class members to request exclusion, the Class Determination Award shall explain the reasons for that conclusion.

(d) The arbitrator shall stay all proceedings following the issuance of the Class Determination Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Class Determination Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Class Determination Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Class Determination Award. If any party in-

forms the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.

(e) A Class Determination Award may be altered or amended by the arbitrator before a final award is rendered.

6. Notice of Class Determination

(a) In any arbitration administered under these Supplementary Rules, the arbitrator shall, after expiration of the stay following the Class Determination Award, direct that class members be provided the best notice practicable under the circumstances (the "Notice of Class Determination"). The Notice of Class Determination shall be given to all members who can be identified through reasonable effort.

(b) The Notice of Class Determination must concisely and clearly state in plain, easily understood language:

(1) the nature of the action;

(2) the definition of the class certified;

(3) the class claims, issues, or defenses;

(4) that a class member may enter an appearance through counsel if the member so desires, and that any class member may attend the hearings;

(5) that the arbitrator will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded;

(6) the binding effect of a class judgment on class members;

(7) the identity and biographical information about the arbitrator, the class representative(s) and class counsel that have been approved by the arbitrator to represent the class; and

(8) how and to whom a class member may communicate about the class arbitration, including information about the AAA Class Arbitration Docket (see Rule 9).

[Rules 7–12 omitted]

APPENDIX E

December 4, 2007
VIA FEDEX

Patricia S. Connor, Clerk
United States Court of Appeals
for the Fourth Circuit
Lewis F. Powell, Jr. United States Courthouse Annex
1100 E. Main Street, Suite 501
Richmond, VA 23219-3517

RE: Long John Silvers Restaurants, Inc., et al. v. Cole, et al. No. 06-1259

Dear Ms. Connor:

Pursuant to Local Rule 28(e) and F.R.A.P. 28(j), we respectfully request that you draw the Court's attention to two decisions rendered by arbitrators in proceedings before the American Arbitration Association, copies of which are enclosed with this letter. The two decisions are a Decision and Order rendered in a proceeding styled *Robert Bryan, et al. v. Joel Antunes, LLC, et al.*, AAA Case No. 11 160 01783 05, and a Class Determination Award rendered in *Mark Johnson, et al v. Morton's Restaurant Group, Inc., et al.*, AAA Case No. 11 160 01513 05. These decisions were rendered after the briefing in this case was completed, and after the initial argument of this action on January 31, 2007, and have come to our attention only recently in connection with our prepara tion for the re-argument of this appeal on December 6, 2007. We submit that the decisions are pertinent and significant to the issues presented in this appeal, for the reasons stated below.

The two enclosed decisions should be considered in connection with the Appellants' reliance on an ar-

bitration award cited by the Appellants at page 42 of their opening brief, *In the Matter of the Arbitration between Smith and TeleTech Holdings*. Unlike the arbitrator in *Smith/TeleTech*, the arbitrators who rendered the two enclosed decisions certified arbitral classes asserting FLSA claims on an opt-out basis, as did the arbitrator in the instant appeal. In both of the enclosed decisions, the arbitrators cite with approval and elect to follow the award of Arbitrator Hodge in this case, certifying an opt-out class of FLSA claimants, as well as the District Court's decision refusing to vacate that award.

The Appellees respectfully submit that the enclosed decisions refute the persistent suggestions that the Class Determination Award of the arbitrator in the instant appeal is aberrational and out of step with the decisions of arbitrators deciding similar issues. Thank you for your assistance in this matter.

Sincerely,
/s/ Darrell L. West
Darrell L. West

Enclosures

cc: Henry L. Parr, Jr., Esq. (via e-mail)
Robert P. Davis, Esq. (via e-mail)
Edward D. Sieger, Esq. (via e-mail)
Kenneth Steven Geller, Esq. (via e-mail)

[enclosures omitted]

Supreme Court, U.S.
FILED
AUG 27 2008
OFFICE OF THE CLERK

No. 07-1370

In the Supreme Court of the United States

LONG JOHN SILVER'S, INC.,
Petitioner,

v.

ERIN COLE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

M. REID ESTES
Counsel of Record
DARRELL L. WEST
STEWART, ESTES & DONNELL, PLC
FIFTH THIRD CENTER, SUITE 1401
424 CHURCH STREET
NASHVILLE, TN 37219
(615) 244-6538

Attorneys for Respondents

August 27, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

The question presented in this case is whether the Court should adopt a new, heightened standard of judicial review under the Federal Arbitration Act, applicable only to the arbitration of federal statutory claims.

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INTRODUCTION

Petitioner Long John Silver's, Inc. ("LJS") asks this Court to grant certiorari to consider whether to adopt an entirely new standard of review applicable to arbitration awards rendered in cases involving federal statutory claims, even though LJS asked neither the district court nor the Fourth Circuit to utilize any standard of review other than the one that has prevailed in the Fourth Circuit for decades.

This Court recently reaffirmed its long-standing commitment to the strong federal policy favoring arbitration, and to the limited judicial review that is a hallmark of that policy, in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008). Despite this Court's restatement of the traditionally narrow scope of judicial review of arbitration awards, LJS petitions the Court to move in the directly opposite direction by authorizing merits-based judicial review of arbitration awards, in cases involving federal statutory claims.

LJS claims that this Court's decisions in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) justify the about-face, saying that the two cases left questions unanswered concerning the scope of judicial review the Court intended to be applicable to arbitrations involving federal statutory causes of action. Curiously, and in virtually the same breath, LJS also asserts that despite the alleged "absence of guidance by the

Court,"[1] *McMahon* and *Gilmer* nevertheless gave "clear instruction"[2] and "admonition"[3] to the federal trial and appellate courts to employ a heightened standard of review of awards involving statutory claims, up to and including review for mere legal error, and that the Fourth Circuit's decision in this case ignored and violated that purported mandate.

However, nothing in the *McMahon* or *Gilmer* opinions supports a grant of certiorari to review the Fourth Circuit's decision in this case. *McMahon* and *Gilmer* were "front-end" cases deciding whether particular federal statutory claimants could be compelled, pursuant to Section 3 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 3, to resolve their claims in arbitration pursuant to mandatory pre-dispute arbitration agreements. In both cases, the Court rejected the claimants' challenges to the adequacy of the arbitral forum, including challenges based on the alleged insufficiency of judicial review of arbitration awards. This Court held in both cases that while the accepted scope of judicial review "'necessarily is limited, *such review is sufficient* to ensure that arbitrators comply with the requirements of the statute' at issue." *Gilmer*, 500 U.S. at 32, n. 4 (*quoting from McMahon*, 484 U.S. at 232) (emphasis added). The Fourth Circuit and the district court considered, and carefully adhered to, the lessons of *McMahon* and *Gilmer*.

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[1] LJS Petition for Certiorari ("Pet."), at 19.

[2] *Id.* at 20.

[3] *Id.* at 25.

LJS also attempts to conjure up a split among the federal circuits concerning the appropriate standard of review of arbitration awards concerning statutory claims. The threshold fallacy in LJS's claim of a circuit split is that, when the decisions of the Fifth and District of Columbia Circuits relied on by LJS as evidence of the circuit split are considered in light of later decisions *of those same circuits*, the purported conflict disappears. Moreover, language differences urged by LJS as evidence of a circuit split do not really appear in the various circuits' articulations of the governing *scope of review*, with respect to which there is very little, if any, genuine disagreement. Instead, those language differences emerge in the appellate courts' attempts to explain what constitutes "manifest disregard of the law."

Not only is the purported schism not real; it is also not germane to any "important matter" within the meaning of Supreme Court Rule 10(a) and related jurisprudence, especially in view of the Court's recent *Hall Street v. Mattel* decision. The significance of the historical language differences in articulating what constitutes manifest disregard of the law has been substantially minimized – and rendered much less suitable for *present* certiorari review – by the Court's decision in *Hall Street*, including the Court's express holding that the Section 10 grounds are the exclusive grounds for vacating an award under the FAA, and the Court's related suggestion that manifest disregard of the law may not be a separate or additional ground for vacating an award at all.

Finally, even if the issue presented were certworthy, this case is not an appropriate one in

which to undertake such review. The decisions below correctly recognized that the challenged arbitration award was based primarily on the unique facts and documents presented to the arbitrator, and that there is serious doubt concerning the very existence of the purported "substantive statutory right" that LJS claims was violated by the arbitrator.

STATEMENT OF THE CASE

The arbitration giving rise to LJS's most recent round of judicial review was commenced in December 2003. The Respondents formerly worked as restaurant general managers and/or assistant managers for LJS. They initiated arbitration on behalf of themselves and all similarly-situated LJS managers (the "Class") to recover overtime compensation the Class members were owed, but were not paid, over a period of several years during which Respondents claim LJS misclassified the class members as exempt from the overtime provisions of the Fair Labor Standards Act ("FLSA").

For forty-six of the fifty-two months that the arbitration has been pending, the Class has been embroiled in federal court actions – and a few collateral state court actions – initiated by LJS to vacate two procedural awards rendered by the arbitrator. LJS has either lost or abandoned every round of such review with respect to both awards, but persists even yet in its efforts to undo one aspect of the second of the two challenged awards.

The substantive claims now asserted against LJS in arbitration were first asserted in federal court. In

2001, Kevin Johnson filed a "collective action" lawsuit pursuant to § 16(b) of the FLSA, 29 U.S.C. § 216(b), in the United States District Court for the Middle District of Tennessee, on behalf of himself and all others similarly situated. Johnson's lawsuit claims were identical to the Respondents' claims in arbitration, except that Johnson sought certification of an "opt-in" class described in FLSA Section 16(b).

LJS vigorously opposed certification of an opt-in class, arguing that Mr. Johnson was required to submit his lawsuit claims to arbitration pursuant to a pre-dispute arbitration agreement that he, the Respondents, and all members of the Class had signed as a condition of employment by LJS. That agreement required covered claims to be arbitrated in the AAA, and further provided that the arbitration would be conducted pursuant to the AAA's rules. *See* LJS Real Resolution Program Booklet, page 10; Ct. App. Joint App. at JA084.

LJS succeeded in having Mr. Johnson's lawsuit claims dismissed by the district court in Tennessee, which concluded that the claims were subject to mandatory arbitration before the AAA. *Johnson v. Long John Silver's Rests., Inc.*, 320 F. Supp. 2d 656 (M.D. Tenn. 2005). That decision was affirmed on appeal. 414 F.3d 583 (6th Cir. 2005).

The AAA Rules applicable to class arbitrations provide that the arbitrator will render two "partial final awards" before addressing the merits. The first of these is called a "Clause Construction Award," in which the arbitrator "determine[s] as a threshold matter . . . whether the applicable arbitration clause

permits the arbitration to proceed on behalf of or against a class." AAA Supplementary Rules for Class Arbitrations ("AAA Class Rules"), Rule 3; Pet. App. at 52a-53a. If the arbitrator answers that question in the affirmative, he or she then proceeds to the "class determination" phase, during which the arbitrator decides whether, in fact, to certify a class in the particular case, pursuant to factors delineated in AAA Class Rule 4, Pet. App. at 53a-54a. The product of the class determination phase is a "Class Determination Award." AAA Class Rule 5, Pet. App. at 54a-55a.

In this case, the arbitrator issued a Clause Construction Award on June 15, 2004, in which he ruled that the parties' arbitration agreement permits class arbitration. LJS filed a Motion to Vacate the Clause Construction Award in the United States District Court for the District of South Carolina. On September 15, 2005, the district court dismissed that motion for lack of subject matter jurisdiction. LJS appealed that dismissal to the Fourth Circuit; after the appeal was fully briefed, LJS voluntarily dismissed its appeal.

One of the issues LJS specifically asked the arbitrator to decide during the class determination phase was whether to utilize an opt-out class pursuant to the AAA Class Rules or an opt-in class described in FLSA Section 16(b). The arbitrator issued his Class Determination Award on September 19, 2005, in which he decided to certify the case as a class action on behalf of a class of present and former LJS restaurant general managers and assistant restaurant general managers employed during a specified time period. In response to LJS's request that he choose whether to

utilize an opt-out or opt-in class, the arbitrator decided to utilize the opt-out provisions of the AAA Class Rules.

LJS filed a Motion to Vacate the Class Determination Award in the district court, in which it challenged four separate aspects of that award, including the arbitrator's decision to use an opt-out class. The district court denied the Motion to Vacate on its merits, on all four points. *Long John Silver's Rest., Inc. v. Cole et al.*, 409 F. Supp. 2d 682 (D.S.C. 2006), which is reproduced as Pet. App. B. LJS appealed to the Fourth Circuit, but limited its appeal to the single opt-out vs. opt-in issue. The Fourth Circuit affirmed the district court on the opt-out vs. opt-in issue in a published opinion, *Long John Silver's Restaurants, Inc. v. Cole, et al.*, 514 F.3d 345 (4th Cir. 2008), reproduced as Pet. App. A.

REASONS FOR DENYING THE PETITION

I. The Petitioner Did Not Raise the Issue Presented in the Petition in Either the District Court or the Fourth Circuit.

In its Petition LJS asks the Court to adopt and apply a new, more rigorous standard of review to the Class Determination Award challenged by LJS, relief it did not seek in either of the courts below. A party's failure to seek resolution in the lower courts of an issue raised in a petition for certiorari normally dooms the petition in this Court. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

LJS claims in the Petition that it requested "heightened" review in both of the courts below, and intimates that those requests were equivalent to the relief it seeks in this Court. Pet. at 8, 9, 10, 11, 13, 20. Not so. LJS never requested that either court utilize a new or different standard of review specific to arbitration awards involving statutory claims.

LJS was content to couch all of its arguments below in terms of the traditional and long-standing Fourth Circuit standards for reviewing arbitration awards, and never suggested that those recognized standards were inadequate to provide sufficient review of the subject award. Indeed, LJS's assault on the arbitration award in both lower courts repeatedly and consistently relied upon the Fourth Circuit's decision in *Remmey v. Paine-Webber, Inc.*, 32 F.3d 143 (4th Cir. 1994),[4] a decision it now criticizes as a source of the Fourth Circuit's allegedly too-narrow and legally insufficient standard of review. Pet. at 10.

To be sure, LJS sometimes quoted to both the district court and the Fourth Circuit the oft-cited language from *McMahon* and *Gilmer* that by agreeing to arbitrate a statutory claim a party does not forego the substantive rights afforded by the statute, and that the judicial scrutiny of arbitration awards, though

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[4] *See* Petitioner's 4th Cir. Brief, avail. at 2006 WL 2726265 *25, 35; Petitoner's 4th Cir. Reply Brief, avail. at 2006 WL 2623026 *7; Petitioner's Dist. Ct. Mem. in Supp. of Motion to Vacate Class Determination Award at 8, 10 [Joint Appendix Filed with the Court of Appeals ("JA") 24, 26]; Petitioner's Dist. Ct. Reply in Supp. of Motion to Vacate, at 13 [JA182].

necessarily limited, is sufficient to ensure that arbitrators comply with the requirements of the statute. But LJS's mere incantation of that language from *McMahon* and *Gilmer* is *not* tantamount to a request that the lower courts utilize a different, and broader, scope of review, which is the relief requested and issue presented in the Petition.

LJS suggests in its Petition that the district court *specifically considered and rejected* its purported request that the court apply the same "heightened" standard of review it requests this Court to adopt. Pet. at 10. As support for this claim, LJS quotes the following language from the district court's opinion: "The Court finds no basis in the law for Movants' suggestion that the Court review the arbitrator's award under a more rigorous standard, and the Court declines to undertake such a review here." *See* Dist. Ct. Memorandum Opinion and Order, at 3; Pet. App. B at 19a. While the district court did reject a request from LJS to employ an unprecedented, and more rigorous, standard of review, *it was not the standard for which LJS advocates in this Court.*

In its opening brief to the district court, LJS cited the Fourth Circuit's decision in *Mountaineer Gas Co. v. Oil, Chemical & Atomic Workers Int'l Union*, 76 F.3d 606, 608 (4th Cir. 1996), as authority for the proposition that "[w]hether an arbitrator exceeded the bounds of his authority is a question of law, and therefore is reviewed *de novo*." *See* LJS's Dist. Ct. Memorandum In Support of Motion to Vacate Arbitrator's Class Determination Award, at 19; JA at JA035. However, *Mountaineer Gas* did not so hold; the cited portions of that decision address the standard of

review employed when the Court of Appeals reviews a district court's decision whether to vacate an award, *not* the standard of review employed by the trial court in the first instance.

Respondents initially failed to correct that clear misstatement of the law, prompting LJS not only to repeat the same argument in a later brief, but to stress that Respondents had failed to point out the error,[5] as if Respondents' failure to point out an obvious misstatement of the law somehow effected a change in the law.

This request by LJS for *de novo* review was the "more rigorous standard" the district court rejected in the footnote cited by LJS in the Petition. As stated above, LJS *never* requested that the district court apply the heightened standard of review it asks this Court to adopt for statutory claim arbitration.

Thus, LJS did not raise in either the district court or the Fourth Circuit the issue it attempts to raise here. Hence, LJS failed to preserve that issue for review here.

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[5] LJS Reply in Support of Petitioners' Motion to Vacate Class Determination Award, at 4, n. 9; JA at JA 173.

II. The Fourth Circuit's Decision Declining to Upset the Arbitrator's Class Determination Award Does Not Conflict with any Decision of this Court, including *McMahon* and *Gilmer*.

LJS complains that the decision below was flawed because it contravened this Court's decisions in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). No such conflict exists; indeed, the Fourth Circuit's decision was both informed by, and in full accord with, those two cases. LJS's additional claim that the Fourth Circuit's opinion "made no mention of" and did not "attempt to reconcile" *McMahon* and *Gilmer*, Pet. at 13, is demonstrably false.

A. Nothing in This Court's *McMahon* or *Gilmer* Decisions, or in Any More Recent Pronouncements, Suggests the Need for More Stringent Review of Arbitration Awards Involving Federal Statutory Claims.

LJS's argument that the Fourth Circuit opinion in this case conflicts with *McMahon* and *Gilmer* is based entirely on the suggestion that these two cases presaged, and even mandated, a "heightened" standard of review of arbitration awards in cases involving federal statutory claims. While LJS poses the question presented simply as "what degree of 'judicial scrutiny . . . is sufficient to ensure that arbitrators comply with the requirements of the statute,'" Pet. at i, that open-ended statement of the issue does not mask exactly what level of scrutiny LJS

is asking the Court to adopt. The Petition makes abundantly clear that the new and heightened standard LJS would have the Court declare would require the judiciary to scrutinize awards for erroneous interpretation and application of the federal statutes, act to ensure broad "compliance" with statutes (presumably, every provision of a statute), and review arbitration awards for mere "legal error." Pet. at 3, 10, 13, 14, 17, 25.

The threshold problem with LJS's argument that the Fourth Circuit violated *McMahon* and *Gilmer* is that neither opinion actually calls for the application of a new or different standard of review in statutory claim arbitration. Both cases involved the arbitration of federal statutory claims, and both cases were decided after decades of jurisprudence in which both this Court and the courts of appeals had articulated the traditional, limited scope of judicial review of arbitration awards. The two cases state specifically that while the accepted scope of judicial review is "'necessarily is limited, *such review is sufficient* to ensure that arbitrators comply with the requirements of the statute' at issue." *Gilmer*, 500 U.S. at 32, n. 4 (*quoting from McMahon*, 484 U.S. at 232) (emphasis added). They neither state nor imply, as LJS suggests, that judicial review "must be" sufficient, implying that something more than the existing scope of review was contemplated or required.

Thus, far from creating unanswered questions concerning the necessary scope of review of arbitral awards related to statutory claims, the Court in *McMahon* and *Gilmer*, which were decided following decades of appellate jurisprudence establishing and

defining the applicable standard of review of which the Court was undoubtedly mindful, expressed confidence that the established standard of judicial scrutiny of arbitral awards "is sufficient" for purposes of the statutory claims the Court permitted to go to arbitration. Those cases certainly conveyed the message that particular arbitral forums must include sufficient safeguards to ensure that the substantive statutory rights of claimants could be effectively vindicated in those forums, but the Court clearly stated that the then-existing and acknowledged scope of review was sufficient to satisfy that requirement. Nothing in the opinions suggests that a separate or heightened level of judicial review should or would be required in the arbitration of statutory causes of action.

Nor does either *McMahon* or *Gilmer* suggest that *all* statutory requirements must be followed to the letter in arbitration, to the same extent as they would be in court; any such rule would effectively preclude the arbitration of statutory claims. Instead, the cases uphold the use of an arbitration forum and agreed-upon arbitral procedures "so long as the prospective litigant *effectively may vindicate* [his or her] statutory cause of action in the arbitral forum." *Gilmer*, 500 U.S. at 28; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). *McMahon* and *Gilmer* never state or imply that wholesale incorporation of statutory procedures and other requirements are essential to the effective vindication of the statutory rights of claimants, or to ensure that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the

statute." *Gilmer*, 500 U.S. at 26; *McMahon*, 482 U.S. at 229; *Mitsubishi*, 473 U.S. at 628.

There is no inconsistency between this Court's insistence that an arbitral forum adequately protect substantive statutory rights, and its present-tense expression in *McMahon* and *Gilmer* of confidence that the then-existing scope of judicial review was adequate in statutory claim arbitration, especially when the two messages are considered in the context of the adjudicative bargain made by parties to arbitration agreements. As the Court observed in *Mitsubishi* and *Gilmer*, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer*, 500 U.S. at 31, *quoting from Mitsubishi*, 473 U.S. at 628.

Hence, the Court has already held that even in the context of statutory claim arbitration, limited judicial review is an inherent, and wholly acceptable, trade off made by the parties in exchange for a simpler, quicker and less formal resolution of their disputes. *Gilmer* itself considered the sufficiency of established judicial review in the section of the opinion[6] in which the Court disposes of Gilmer's "host of challenges to the adequacy of arbitration procedures." 500 U.S. at 30. The Court evaluated Gilmer's challenge to the sufficiency of established judicial review the same way it evaluated his challenges to the fairness of arbitration panels, limitations on discovery in

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[6] Section B of the opinion, commencing 500 U.S. at 30.

arbitration, and arbitrators' frequent failure to issue written opinions.[7]

The Court determined that none of the various procedural limitations inherent in arbitration – including limited judicial review – made the process fundamentally unfair, or rendered the arbitral forum incapable of effectively vindicating substantive statutory rights. Curiously, LJS suggests that the Court's *approval* of one such procedural limitation – limited judicial review – somehow impliedly mandated a going-forward change in or elimination of the approved limitation.

This Court's recent decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), confirms the view that the limited review of statutory claim arbitration remains sufficient to satisfy all requirements of the *Gilmer* case. *Hall Street* states that the three sections of the FAA dealing with post-award enforcement – Sections 9, 10 and 11 – are properly read "as substantiating a national policy favoring arbitration with just the limited review

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[7] Of special significance to this case is the Court's inclusion, in its discussion of the alleged inadequacy of "arbitration procedure," of Gilmer's contention that arbitration forums might not permit class actions. Clearly, the Court considered the availability *vel non* of class actions in arbitration to be an issue involving arbitration *procedure*, rather than as one implicating substantive statutory rights. The *Gilmer* court undoubtedly would have reached the same conclusion with respect to the opt-out vs. opt-in issue decided by the arbitrator in this case, which is a subsidiary class action issue.

needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Id.* at 1405.

Respondents are well aware that *Hall Street* did not involve the arbitration of federal statutory claims. Nevertheless, *Hall Street* is a powerful reminder that the strong federal policy favoring arbitration – a policy that underlay the *Gilmer* court's determination that limited judicial review was acceptable in statutory claim arbitration – is as strong today as in 1991.

Hall Street's express holding that the grounds for vacating arbitration awards contained in FAA Section 10 are the exclusive grounds authorized by that Act suggests that the Court would be loath to consider necessary any expansion of the historically applicable standard of review – especially an expansion of the magnitude proposed by LJS in the Petition. This is even clearer because of the majority's emphasis that the FAA Sections 10 and 11, 9 U.S.C. §§ 10, 11, grounds for vacating arbitration awards all involve serious arbitrator misconduct.

> Sections 10 and 11, after all, address egregious departures from the parties' agreed-upon arbitration: "corruption," "fraud," "evident partiality," "misconduct," "misbehavior," "exceed[ing] powers," "evident material miscalculation," "evident material mistake," "award[s] upon a matter not submitted; the only ground with any softer focus is "imperfect[ions]," and a court may correct those only if they go to "[a] matter of form not affecting the merits."

128 S. Ct. at 1404. Because of the egregious nature of conduct necessary to permit vacatur of an award, the Court rejected the petitioner's attempt to "expand the stated grounds to the point of evidentiary and legal review generally." *Id.*

The majority in *Hall Street* also decried the petitioner's attempt to imply non-fault based grounds into the governing language of the FAA, or a more rigorous level of judicial review than the language of the FAA permits:

> Instead of fighting the text, it makes more sense to see the three provisions, §§ 9-11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can "render informal arbitration merely a prelude to a more cumbersome and time consuming judicial review process," (citations omitted) and bring arbitration theory to grief in post-arbitration process.

128 S. Ct. at 1405.

LJS may say that the foregoing words, evidencing a continuing conviction in this Court that limited judicial review is necessary to advance the national pro-arbitration policy, were not uttered in a statutory arbitration case. The problem with that argument is that the just quoted words strongly echo the declaration in *Gilmer* that limited judicial review in

statutory claim arbitration is an acceptable – indeed necessary – trade off for "the simplicity, informality and expedition of arbitration." 500 U.S. at 31. There is simply no reason to believe that there has been any erosion since the 1991 *Gilmer* decision of the Court's conviction as to the propriety of historically limited judicial review of arbitration awards rendered in statutory claim arbitration.

B. Petitioner's Claim That the Fourth Circuit Failed to Consider *McMahon* or *Gilmer* is Not True, as the Decision Below Plainly Reveals.

LJS introduces its "Reasons for Granting the Writ" with the following statement: "[T]he court of appeals made no mention of this Court's statements in *McMahon* and *Gilmer*, nor did it attempt to reconcile them with its own explicit refusal to decide whether the arbitrator had properly interpreted and applied the FLSA." Pet. at 13. Both clauses of the quoted statement are untrue.

Three pages of the Fourth Circuit's opinion are devoted to a discussion and analysis of *Gilmer*. *See* Pet. App. A at 9a-11a. Although *McMahon* is not mentioned by name, the Fourth Circuit cites to *Gilmer* text that in turn quotes *McMahon*, and more importantly, the court thoughtfully analyzes the test announced and employed in both *McMahon* and *Gilmer* for determining what alleged rights constitute "substantive statutory rights" that must be effectively vindicated in arbitration.

According to *McMahon* and *Gilmer* a party will be deemed to have submitted purported statutory rights to resolution according to arbitral procedures "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue," *Gilmer*, 500 U.S. at 27 (*citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Such preclusion must be "discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Id.*, *citing McMahon*, 422 U.S. at 227.

The Fourth Circuit concluded, as did the district court, that LJS failed to carry its burden of satisfying the *McMahon / Gilmer* test for establishing that the opt-in provision of FLSA Section 16(b) was a substantive statutory right that could not be waived by the parties' agreement to use the opt-out procedure contained in the AAA's class arbitration rules. The Fourth Circuit said: "Put simply, it is far from clear that the 'opt-in' aspect of the § 16(b) provision is such a nonwaivable substantive right."

LJS may disagree with the Fourth Circuit's conclusion. But it cannot in good faith claim that the Fourth Circuit failed to consider the lessons of *McMahon* and *Gilmer* in reaching that conclusion.

III. This Case Does Not Implicate any Genuine Circuit Split.

A. The Circuit Split Asserted by Petitioner Does Not Exist.

LJS's claim that "the circuits have fundamentally split over the appropriate standard of review" of arbitral awards involving federal statutory claims is based on a contention that the Fifth and District of Columbia Circuits apply a different *standard of review* than the Fourth, Second and Eleventh Circuits, and that this Court must enter the breach to resolve that conflict. The purported discord is the product, says LJS, of "absence of guidance by the Court," as a result of which "the lower courts have fashioned their own diverse – and inconsistent – doctrines." Pet. at 19.

LJS claims that the standard of review in the Fourth, Second and Eleventh Circuits is so deferential that those courts only permit arbitration awards to be set aside on "manifest disregard" grounds when there is a showing that the arbitrator *willfully* declined to follow law that the arbitrator acknowledged to be controlling. LJS also complains that those courts accord equal deference to awards entered with respect to federal statutory claims as they do in other types of arbitration.

According to LJS, the Fifth and District of Columbia Circuits operate differently, employing a "heightened" standard of review in cases involving statutory claims than in other types of arbitration. That heightened standard of review ostensibly flows from perceived mandates issued by this Court in

McMahon and *Gilmer* that reviewing courts in statutory claim arbitration must apply more stringent review than in other types of arbitration, to insure "arbitral compliance with statutory requirements." Pet. at 22.[8]

A closer examination of the cases which LJS holds up as establishing the circuit split reveals that there is no meaningful disagreement among the circuits concerning the *standard of review* to be applied to arbitral awards involving statutory claims. The differences arise in how the various courts define what constitutes a particular *ground* for vacating awards, that ground being manifest disregard of the law.

Indeed, an examination of the very cases upon which LJS builds its claim that the circuits are in conflict shows that the distinction between them and other circuits was not the standard of review itself, but only with respect to what constituted a manifest disregard of the law in the context of statutory claim arbitration. LJS cites *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997) and *Williams v. Cigna Financial Advisors, Inc.*, 197 F.3d 752 (5th Cir. 1999) as the primary cases from the District of Columbia and Fifth Circuits that purportedly exemplify those circuits' split from the Fourth, Second and Eleventh Circuits.

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[8] As shown in Section II *supra*, this premise is erroneous, because *McMahon* and *Gilmer* actually only require arbitral forums to afford "effective vindication" of "substantive statutory rights" (not literal or identical compliance with *all* statutory requirements, substantive or otherwise).

Cole was a "front-end case" – deciding whether the court would enforce pre-dispute mandatory arbitration agreements required to be executed by employees as a condition of employment. The D.C. Circuit analyzed a number of objections lodged by the plaintiff to having to resolve his Title VII claims in such an arbitration, including several challenges to various aspects of the arbitration process. In addressing the plaintiffs' arguments concerning the level of judicial review of arbitration awards, the court acknowledged the FAA Section 10 grounds for vacating an award, but pronounced them "not exclusive," 105 F.3d at 1486, and identified manifest disregard of the law as an additional ground. The court went on to say that the "assumptions" of the *Gilmer* court are only valid if "judicial review *under the 'manifest disregard of the law'* standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law." 105 F.3d at 1487 (emphasis added).

Cole was decided more than eleven years ago, and any notion that the D.C. Circuit, on the strength of *Cole*, applies a wholly different standard of review in statutory claim arbitration has been eliminated by later decisions of the same court. In at least two cases, *both of which involved the arbitration of statutory claims*, the D.C. Circuit described the requirements for proving manifest disregard of the law in the same terms traditionally employed in the Fourth, Second and Eleventh Circuits.

In *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702 (D.C. Cir. 2001), the plaintiff asserted several claims against her former employer, including violations of Title VII and the Federal Equal Pay Act. The plaintiff

had been compelled to arbitrate her claims, and she went to court to try to vacate a portion of the resulting award, alleging manifest disregard of the law. In evaluating her challenge to the award, the court stated as follows:

> Manifest disregard of the law 'means more than error or misunderstanding with respect to the law.' (citations omitted) Consequently, to modify or vacate an award on this ground, a court must find that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.

246 F.3d at 706. The authorities cited by the D.C. Circuit in support of the foregoing quoted language included a *Second Circuit* case, *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818 (2d Cir. 1997).

Similarly, in the more recent case of *Kurke v. Oscar Gruss and Son, Inc.*, 454 F.3d 350 (D.C. Cir. 2006), which involved an arbitration of claims that included alleged violations of the Securities Exchange Act, the court said:

> "Manifest disregard," however, is an extremely narrow standard of review. It "means much more than failure to apply the correct law." (citation omitted) Rather, to vacate an award under that standard, we "'must find that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether[,] and (2) the law ignored by the arbitrators was

> well defined, explicit, and clearly applicable to the case.'"

454 F.3d at 354 (citing *La Prade* and *DiRussa*).

Hence, LJS's claim that *Cole v. Burns International Security Services* puts the District of Columbia Circuit at odds with any other circuits, including the Fourth Circuit in this case, is groundless. As the later D.C. Circuit cases make clear, that court's rules concerning the proper scope of review, as well as its articulation of the requirements for proving manifest disregard, are wholly in line with those of the circuits LJS claims to conflict with the D.C. Circuit, even as regards the review of awards rendered in statutory claim arbitration. Indeed, the D.C. Circuit has specifically embraced the one aspect of Fourth, Second and Eleventh Circuit jurisprudence which LJS most vehemently opposes – the requirement that an arbitrator must *know of* the allegedly "disregarded" law and of its application to the arbitration under review, before a court can vacate for manifest disregard.

The Fifth Circuit case relied upon by LJS is *Williams v. Cigna Financial Advisors, Inc.*, 197 F.3d 752 (5th Cir. 1999). The actual holding of *Williams*, insofar as the review of arbitration awards was implicated, was both narrow and unremarkable; the case held that in arbitration cases involving alleged violations of federal statutes, awards should be reviewed for manifest disregard of the law, and that the presence or absence of manifest disregard should be determined "in light of the bases underlying [this] Court's *Gilmer*-type cases." 197 F.3d at 762. The

Williams opinion does not state that a particular standard or level of review should apply, merely suggesting that reviewing courts be informed by *Gilmer*'s concern that the forum permit the effective vindication of substantive statutory rights.

Contrary to the suggestion of LJS, *Williams* did not announce, or purport to require, any different standard of review than that which obtained in any other circuit. A later Fifth Circuit case, involving the arbitration of ERISA claims, describes the applicable standard of review in traditionally limited fashion, noting that reviewing courts were to take an "extremely deferential" view of an arbitrator's award, and that such review is "extraordinarily narrow." *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 352 (5th Cir. 2004).[9] The court added:

> [M]anifest disregard for the law "means more than mere error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing

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[9] *Kergosien* was also decided after the other Fifth Circuit case relied on by LJS as putting the Fifth Circuit in conflict with the Fourth, Second and Eleventh Circuits, *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294 (5th Cir. 2004).

> principle but decides to ignore or pay no attention to it."

390 F.2d at 355 (citation omitted).

Accordingly, any circuit conflict previously suggested by *Cole* or *Williams* has been eliminated by subsequent decisions of the District of Columbia and Fifth Circuits. No real conflict in the circuits has been shown by Petitioner.

B. Semantic Differences in Particular Courts' Descriptions of Manifest Disregard Do Not Establish a Certworthy Circuit Split.

It is clear from the foregoing discussion that the language differences among the circuits do *not* evidence a "split" with respect to the standard of review applicable to statutory awards. They are, at most, minor variations in defining what constitutes manifest disregard of the law. Such miniscule differences do not constitute a legitimate basis for granting certiorari, which "will only be granted for compelling reasons."[10]

Stated differently, all of the cases discussed by LJS – on both sides of the purported circuit conflict – recognized that manifest disregard was a ground for vacating arbitration awards of statutory claims, and merely differed somewhat as to the definition of manifest disregard. If one side or the other of such a "conflict" is thought to be wrong, then nothing more

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[10] Supreme Court Rule 10.

has been shown than a "misapplication of a properly stated rule of law" by the erroneous side, which is historically, and by rule of court,[11] rarely a sufficient basis for exercise of the Court's certiorari jurisdiction.

As the Court is well aware, the circuits for decades have employed divergent language to explain what constitutes "manifest disregard of the law" within the meaning of the Court's dictum in *Wilko v. Swann*, 346 U.S. 427 (1953), but those varying articulations have always been more about semantic differences than substantive disagreement among the circuits. The Court has not seen fit before now to reconcile those semantic differences, and the instant case provides no additional or better justification for doing so. Indeed, in light of the Court's recent decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), there is likely less reason for the Court to undertake that mission now than ever before.

The Court's express holding in *Hall Street* that the Section 10 grounds are the exclusive grounds for vacating an award under the FAA, and the Court's related suggestion that manifest disregard of the law *may not be a separate or additional ground for vacating an award at all*, call into question the current importance of any circuit split thought to exist. With the status of manifest disregard "up in the air," there is even less reason for this Court to undertake a reconciliation of conflicting definitions of what constitutes manifest disregard.

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[11] *Id.*

IV. Even Assuming the Question Presented Were Certworthy, This Would Not be an Appropriate Case for Consideration of the Question.

As demonstrated above, this case does not implicate any conflict with the decisions of this Court or among the circuits. But even if the question did implicate a certworthy conflict, this case would be an inappropriate vehicle for exploring the question presented.

A. The Arbitrator's Award and the Lower Courts' Decisions Not to Disturb that Award are Fact- and Document-Specific.

The decision of the Fourth Circuit, like the district court's ruling and the arbitrator's award that preceded Fourth Circuit review, are primarily the products of the unique facts and circumstances of this case, the combination of which is unlikely to present itself in future federal court review proceedings. LJS presents an abstract issue for review in its Petition, but the disposition of this matter at every prior level turned on the particular facts, relevant documents, and procedural history of this case.

LJS attempts to skirt that problem by claiming the arbitrator's "refusal to apply" the opt-in requirement of FLSA Section 16(b) was "based solely on the fact that the parties had agreed to arbitrate." Pet. at 12. Not so. A host of factors prompted the arbitrator's decision to employ the opt-out procedure required by the Rules of American Arbitration Association ("AAA"),

rather than the opt-in provision contained in Section 16(b).

The award and the cases below were based substantially on the language of the parties' arbitration agreement. It is undisputed that the pre-dispute arbitration agreement that LJS required job applicants to sign specifically provided that arbitrations would be conducted pursuant to the AAA's rules. *See* LJS Real Resolution Program Booklet, page 10; JA at JA084. At the time the subject arbitration was commenced, the AAA Rules included its "Supplementary Rules for Class Arbitrations," which are reproduced in Appendix D to the Petition. The first sentence of those Supplementary Rules states as follows: "These Supplementary Rules for Class Arbitrations ("Supplementary Rules") shall apply to *any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association ("AAA") where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules.*" Pet. App. D at 51a (emphasis added).

Thus, the very rules that the parties chose to govern their future arbitrations provided that class claims or purported class claims would be governed by the Supplementary Class Rules. It is also undisputed that the AAA's Supplementary Class Rules specifically call for the use of opt-out class procedures, similar to those contained in Fed. R. Civ. P. 23. *See, e.g.*, Supplementary Rules 5(c) and 6(b)(5) (Pet. App. D at 55a-56a).

The arbitrator in this case *did not*, as LJS suggests, choose to utilize the AAA's opt-out procedure simply because the parties had "agreed to arbitrate." Instead, the arbitrator construed the arbitration agreement and specifically (and correctly) found that the parties' contractual choice to arbitrate by AAA's Rules included an agreement to utilize the Supplementary Class Rules, including their opt-out procedures.

The arbitrator also based his decision on the procedural history of the arbitration itself, and of the *Johnson* case[12] in which the Class claims asserted in the arbitration were initially pursued. The arbitrator stated that LJS's prior rejection of the FLSA opt-in procedures in *Johnson* was an additional factor favoring utilization of the AAA out-out procedures. Class Determination Award, Pet. App. C at 33a-34a. The arbitrator also observed as follows:

> Had this case been permitted to proceed as a collective action in Johnson, these issues [opt-in vs. opt-out] would not have arisen. By invoking their contractual rights, the parties have submitted to the procedural requirements of the contract. Critically [LJS's] pretrial maneuverings in Johnson and this arbitration have resulted in protracted delays which would now create a fundamental unfairness by the opt-in procedure which, as noted, would significantly reduce the class population in derogation of fundamental objectives.

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[12] See discussion at 4-5, *supra*.

> [I]t has been the endless procedural machinations first in Johnson and now in this arbitration which have acted to jeopardize numerous potentially legitimate claims. To some extent, it is the very procedural history of this case which has rendered ineffective the opt-in procedures of the FLSA. Equity is better served by preserving the rights of potential claimants who have been "sidelined" during the progress of this case.

Id. at 35a-36a.

Hence, the arbitrator's decision to utilize the opt-out provisions of the AAA Rules was based not only on his finding that the parties' contract called for the use of those rules; it was substantially driven by equitable considerations relating to LJS's prior litigation conduct, and the potential adverse impact that conduct would have on Class members' claims. Both the district court, Dist. Ct. Mem. Opinion and Order, Pet. App. B at 26a-27a, and the Fourth Circuit found that the arbitrator's consideration of equitable factors was entirely proper and appropriate. The Fourth Circuit said: "In this regard, we agree with the district court that LJS's assertion [that the arbitrator was simply advancing his own "personal notions of right and wrong"] is contradicted by the fact that the arbitrator relied on settled principles in support of his reliance on equity,[13] *and by the provision of the arbitration agreement empowering the arbitrator to 'award any*

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[13] *Gilmer* itself held that arbitrators "have the power to fashion equitable relief." 500 U.S. at 32.

relief which a court could award.' Fourth Circuit Opinion, Pet. App. A. at 15a-16a, n. 9 (*quoting from* Dist. Ct. Opinion, Pet. App. B at 27a) (emphasis added).

B. The Linchpin of LJS's Petition – Its Claim that the FLSA's Written Consent Requirement Constitutes a Substantive Statutory Right Within the Meaning of *McMahon* and *Gilmer* – Lacks any Legal Support.

An additional reason why this case is an inappropriate vehicle for decision of the issue presented by LJS is that, as the Petition itself acknowledges, the "heightened" standard of review for which it argues would only apply to awards that are alleged to impinge on substantive statutory rights. LJS's argument that this Court should grant certiorari depends *entirely* on LJS first establishing that the "written consent" or "opt-in" provision contained in FLSA Section 16(b) constitutes a substantive statutory right within the meaning of *McMahon* and *Gilmer* because it is only such rights that are required to be effectively vindicated pursuant to those two cases.

There is no governing authority to establish that *sine qua non* to LJS's entitlement to certiorari review. When the arbitrator rendered his Class Determination Award, no court, adjudicative board, or administrative agency (including the Department of Labor) had ever held, opined, or even argued (to the knowledge of Respondents) that the "opt-in" requirement contained in FLSA Section 16(b) constituted a substantive statutory right.

On its face, the written consent or opt-in, requirement appears to be purely a *procedural limitation* on participation in litigation. Case law prior to issuance of the Class Determination Award confirmed this status. A clear indication of whether the opt-in requirement is procedural or substantive can be found in how Congress has chosen to utilize it. Whereas the substantive provisions of the FLSA are unique, extending protections to employees different from rights accorded under other federal civil rights acts such as the Age Discrimination in Employment Act, Title VII, and the Equal Pay Act, Congress has imported the FLSA's opt-in mechanism into substantively different acts such as the ADEA and the EPA. As this Court observed in *Lorrilard v. Pons*, 434 U.S. 575, 584-85 (1978), "rather than adopting the procedures of Title VII for ADEA actions, Congress rejected that course in favor of incorporating the FLSA procedures."

Several courts of appeals have specifically described the entire FLSA collective action mechanism, of which the opt-in provision is but a part, to be procedural. "Among the FLSA procedures incorporated into the ADEA is that which permits bringing a collective action." *Sperling v. Hoffman-LaRoche, Inc.*, 862 F.2d 439, 444 (3d Cir. 1988), *aff'd* 493 U.S. 165 (1989). *See, also Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008, 1016 (7th Cir. 1988) (referring to the "FLSA-based litigation process" and the "'opt-in' provision of the FLSA" as "litigation procedure").

Gilmer itself specifically held that *the entire collective action process* of FLSA Section 16(b) was

non-substantive and waivable in favor of contrary arbitration procedures. 500 U.S. at 32. The Fourth Circuit so held prior to the arbitrator's Class Determination Award and the district court decision denying LJS's motion to vacate. *Atkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002).[14]

As the Fourth Circuit said in this case, "[i]f the right to initiate a collective action can be waived, as the Claimants assert, it may be inferred that an 'opt-in' procedure relating to any such right (here, the FLSA § 16(b) provision) can also be waived." Ct. App. Opinion, Pet. App. A at 11a. Both the district court and the Fourth Circuit recognized that LJS had not provided the arbitrator with any authority requiring the use of FLSA Section 16(b)'s opt-in requirement even though the parties had agreed in their arbitration clause to utilize an arbitral forum's rules that specifically direct the use of an opt-out class.

Both courts below expressed serious doubt that the opt-in requirement constitutes a substantive right.[15] If

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[14] Indeed, in one of the cases urged by LJS as evidence of a circuit split, the Fifth Circuit expressly rejected the FLSA plaintiffs' "claim that their inability to proceed collectively [in arbitration] deprives them of substantive rights available under the FLSA." *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004). The *Carter* court distinguished the collective action right from the Plaintiffs' right to recover attorneys' fees, which it impliedly found to constitute a substantive statutory right. *Id.* at 299, n.1.

[15] Court of Appeals Opinion, Pet. App. A at 11a, n.8. Dist. Ct. Memorandum Opinion and Order, Pet. App. B at 22a. For the

the Court were inclined to take up the question presented in LJS's Petition, it should be taken up in a case where substantive statutory rights are *clearly* implicated, and the Court's resolution of the issue would be outcome determinative. This is not that case.

LJS attempts to bolster its unpersuasive argument that the written consent requirement is substantive by arguing that it is "impossible to apply the FLSA statute of limitations without the written consent requirement." Pet. at 30. In most cases, there is certainly a connection between the running of the statute of limitations and the date of a suit plaintiff files his or her written consent to join the action.

In arguing that this case is an appropriate vehicle for deciding the question presented in the Petition, LJS states: "The arbitrator in this case apparently assumed that the statute of limitations for absent class members of the 'opt out' class he certified would cease to run at the time the original arbitration proceeding was filed. That assumption is contradicted by the unambiguous language of 29 U.S.C. § 256." *Id.*

LJS knows there was no such "assumption" by the arbitrator in this case. LJS knows that in December 2001, LJS entered into a Stipulation for Stay and Tolling Agreement in the *Johnson* litigation which the

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record, Respondents do not even consider that issue a close call, for the reasons set forth above in Section IV.B.

arbitrator *expressly* (and correctly)[16] determined to apply to the arbitral claims of the Respondents and the claims of the arbitral Class. Arbitrator's Class Determination Partial Final Award, Pet. App. C at 36a-39a. Because there is no issue in this case concerning the impact of the FLSA's written consent requirement on the statute of limitations, this case is an even more inappropriate vehicle for consideration of the question presented in the Petition, even if it were otherwise deemed certworthy.

C. Even if Substantive Rights are Implicated by the Section 16(b) Written Consent Requirement, LJS has Adduced No Evidence that Such Rights Were Not Effectively Vindicated by the Opt-Out Class Procedures Used in this Arbitration.

Although LJS has failed to establish the status of the opt-in or written consent requirement as a substantive federal statutory right, it would not be *enough* for LJS to do so, as LJS seems to contend. *Gilmer* makes clear that arbitrators and arbitral forums do not have to enforce such rights in precisely the same way they are enforced in court.

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[16] LJS unsuccessfully challenged this aspect of the Class Determination Award in its district court Motion to Vacate. See District Court Memorandum Opinion and Order, Pet. App. B at 27a, n.3. No issue was raised in the Fourth Circuit concerning applicable of the tolling agreement, so this issue has been conclusively resolved against LJS. In this case, the statute of limitations applicable to the Respondents' and Class claims has been tolled since December 2001.

Instead, *Gilmer* requires only that substantive statutory rights be "effectively vindicated" in the arbitral forum. 500 U.S. at 28. *Mitsubishi Motors, Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1991). The record in this case is devoid of any evidence showing, or even suggesting, that the opt-out procedure employed in the arbitration failed to "effectively vindicate" any alleged substantive right not to participate in the arbitration without giving one's written consent.

Indeed, at no time during the course of the lengthy judicial review undertaken by LJS has it ever suggested or argued why the extensive class protections built into the AAA Class Rules fail to effectively vindicate the asserted right. Those rules include the following requirements: that the arbitrator "direct that class members be provided the best notice practicable under the circumstances"; that such notice "be given to all members who can be identified through reasonable effort"; that the nature of the arbitration and the arbitral claims be explained to the class members; that class members have the right to enter an appearance through their own counsel if desired; that class members be informed how to elect to be excluded from the class, and that any class member requesting exclusion will be excluded; and that the binding effect of a class judgment be explained to class members. AAA Class Arbitration Rule 6; Pet. App. D at 56a-57a.

This Court exercises its certiorari jurisdiction to decide important *issues*, but it reserves the exercise of that jurisdiction for cases in which the issues decided will be relevant and outcome-determinative in the

underlying case or controversy. There is no proof – nor indeed any argument – that the class protections provided for under the AAA Class Rules and utilized in this arbitration failed to vindicate the purported opt-in "right" for which LJS argues. In the absence of such proof, this case is an inappropriate vehicle for deciding the question presented in the Petition.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

M. REID ESTES
Counsel of Record
DARRELL L. WEST
STEWART, ESTES & DONNELL, PLC
FIFTH THIRD CENTER
SUITE 1401
424 CHURCH STREET
NASHVILLE, TN 37219
(615) 244-6538

Attorneys for Respondents

Date: August 27, 2008

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(3)

Supreme Court, U.S.
FILED
SEP 9 - 2008
OFFICE OF THE CLERK

No. 07-1370

In the Supreme Court of the United States

LONG JOHN SILVER'S, INC.,

Petitioner,

v.

ERIN COLE, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

PETER J. GREGORA
LAURA W. BRILL
Irell & Manella LLP
1800 Avenue of the Stars
Los Angeles, CA 90067
(310) 277-1010

HENRY L. PARR, JR.
DAVID H. KOYSZA
Wyche, Burgess, Freeman and Parham, P.A.
Post Office Box 728
Greenville, S.C. 29602
(864) 242-8200

DAN HIMMELFARB
Counsel of Record
ROBERT P. DAVIS
TAMARA S. KILLION
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

RULE 29.6 STATEMENT

Reference is hereby made to the Rule 29.6 Statement in Petitioner's Petition for a Writ of Certiorari filed in this action.

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REPLY BRIEF FOR PETITIONER

Respondents' Opposition to the Petition for a Writ of Certiorari ("Opp.") demonstrates why the Petition should be granted.

As the Petition explains, the Fourth Circuit's decision in this case conflicts with this Court's decisions in *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Pet. 14-18. It also exacerbates an already serious circuit split, since the D.C. and Fifth Circuits hold that *McMahon* and *Gilmer* require heightened scrutiny of arbitrators' interpretation and application of federal statutes, while the Fourth, Second and Eleventh Circuits have rejected any suggestion that the courts have a responsibility to ensure that arbitrators correctly interpret and apply federal statutes. Pet. 18-25. Respondents assert that (1) Petitioner did not raise the issue below, (2) the Fourth Circuit's decision is not inconsistent with *McMahon* and *Gilmer*, (3) there is no circuit split on the issue, and (4) the result in this case would be the same even if Petitioner's position were correct.

None of these contentions is accurate. Respondents' arguments do nothing to minimize the significance of the issue presented or the reasons why this Court should decide it.

A. Petitioner Raised The Issue Below.

Respondents claim that Petitioner never raised the issue presented by the Petition in the lower courts. Opp. 7-10. Respondents are incorrect.

In its brief before the Fourth Circuit, Petitioner argued:

> Thus, especially in cases in which statutory rights are at stake, it is not enough that an ***arbitrator analyzed*** a question of law; judicial review of an arbitration award must be thorough enough "'to ensure that arbitrators ***comply*** with the requirements of the statute' at issue." *Gilmer*, 500 U.S. at 32 n.4 (1991) (emphasis added) (quoting *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 232 (1987)); *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752, 759 (5th Cir. 1999) (recognizing that *Gilmer* requires "judicial scrutiny of arbitration awards under the FAA involving [federal statutory] claims sufficient to ensure that arbitrators comply with the requirements of those * * * statutes").

2006 WL 2726265, at *34. Petitioner made the identical argument in the district court. CA JA 23; *see* CA JA 26.

Petitioner thus raised precisely the issue it presents in the Petition – whether *McMahon* and *Gilmer* require a heightened level of scrutiny of arbitrators' interpretation and application of federal statutes.

B. The Fourth Circuit's Decision Is Inconsistent With *McMahon* And *Gilmer*.

Respondents argue that the Fourth Circuit's decision in this case is consistent with *McMahon* and *Gilmer* because, according to Respondents, those cases do not suggest that the courts should determine whether arbitrators misinterpreted or misapplied federal statutes but merely express satisfaction that a *complete absence* of substantive review is "sufficient to ensure that arbitrators comply with the re-

quirements of the statute." Therefore (Respondents argue), the Fourth Circuit's refusal even to consider whether the arbitrator misinterpreted the FLSA was fully consistent with *McMahon* and *Gilmer*. Respondents also assert that any other conclusion would contravene the Court's decision in *Hall Street Associates L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), emphasizing the limited nature of judicial review of arbitral decisions. Opp. 11-18.

Respondents are incorrect on all grounds. There is no way to reconcile the Fourth Circuit's decision with *McMahon* and *Gilmer*. The language and context of *McMahon* and *Gilmer* do not support Respondents' contention, and this Court's requirement that review be sufficient to ensure arbitral compliance with statutory mandates is fully consistent with the limited nature of judicial review of arbitral awards.

1. Language

The language used by this Court in *McMahon* and *Gilmer* is utterly inconsistent with the standard enunciated by the Fourth Circuit in this case. *McMahon* and *Gilmer* state that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute." *McMahon*, 482 U.S. at 232; *Gilmer*, 500 U.S. at 32 n.4. By contrast, the Fourth Circuit stated that "a reviewing court is entitled to 'determine only whether the arbitrator did his job – not whether he did it well, correctly, or reasonably.'" Pet. App. 7a.

To say that *McMahon* and *Gilmer* are consistent with the Fourth Circuit's standard is to say that this Court is incapable of expressing itself. If this Court wanted to say that arbitrators' misinterpretation of a

federal statute was essentially uncorrectable, it would hardly have referred to judicial review as "sufficient to ensure that arbitrators comply with the requirements of the statute."

2. Context

The context of the discussions of judicial review in *McMahon* and *Gilmer* – both textual and historical – also contradicts Respondents' assertion that these cases approved a standard of review incapable of vindicating congressionally mandated rights.

McMahon and *Gilmer* view an arbitration agreement as merely a type of forum selection clause, with the parties having the same substantive rights they would have in litigation. 482 U.S. at 229-230; 500 U.S. at 26. That is the context in which the Court provided assurance that judicial review would be "sufficient to ensure" arbitral compliance with the requirements of the statute. In that light, it is impossible that the Court was saying – as Respondents contend – that arbitrators' violation of statutory mandates was essentially uncorrectable.

The historical context also supports this conclusion. Respondents are simply wrong in their assertion that *McMahon* and *Gilmer* implicitly rely on "decades of jurisprudence" (Opp. 12) rejecting substantive review of arbitral decisions. In fact, *McMahon* was the *first case* to approve domestic arbitration of statutory claims. The Court's previous cases involved review of arbitral awards under collective bargaining agreements – situations that the Court recognized were not analogous to arbitration of

statutory claims.[1] As Chief Judge Edwards noted in *Cole*, "[a]rbitration in collective bargaining has . . . a plethora of case law to support it. Arbitration of statutory claims, however, is the proverbial 'new kid on the block' . . . ." 105 F.3d at 1473.

The Court has recognized that arbitration of federal statutory claims implicates unique issues because rights under public laws are involved. Thus, the Court originally held that such claims were not arbitrable at all (Pet. 15), and changed its view in *McMahon* only with the assurance that judicial review would be sufficient to vindicate statutory rights. This assurance was critical, because there was no history of arbitration in this field – the Court was treading new ground, and therefore creating new rules. These new rules necessarily required adequate means for vindicating statutory rights. As Professor Gorman has explained:

> It is one thing when an arbitrator deciding a grievance under a collective agreement makes a foolish error in interpreting or applying the contract terms; it is unlikely that any significant public policy will be impaired and, in any event, the parties are free to at-

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[1] In *United Steel Workers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960), the Court noted that arbitrators under collective bargaining agreements apply the "common law of the shop," rather than public law. *Id.* at 579-580. The D.C. Circuit in *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997), emphasized the significant differences between the two types of arbitration (*id.* at 1473-1477) and said that reliance upon cases involving collective bargaining arbitration as a template for review of arbitral decisions of claims under federal employment laws is "a mischievous idea, one that we categorically reject" (*id.* at 1473).

> tempt promptly to rectify the error . . . at the next contract renegotiation. When the arbitrator's error relates to statutory interpretation or application, there is legitimate concern that a larger public objective has been frustrated.

Robert A. Gorman, *The* Gilmer *Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635, 669-670 (1995).

Thus, the historical context of *McMahon* and *Gilmer* belies Respondents' claim that the Court was informed by "decades of jurisprudence" – never cited – in purportedly concluding that the complete absence of substantive review was "sufficient to ensure that arbitrators comply with the requirements of the statute." If that were the case, then the Court was making an empty promise when it stated that a party agreeing to arbitrate a statutory claim "does not forgo the substantive rights afforded by the statute." *McMahon*, 482 U.S. at 229.

3. Limited judicial review

Respondents further claim that *McMahon* and *Gilmer* could not have contemplated substantive review of arbitral interpretation and application of federal statutes because that would be inconsistent with the nature of arbitration, which demands limited judicial review. They argue that this Court's recent decision in *Hall Street* emphasizes the limited nature of such review. Opp. 14-18.

Nobody doubts that judicial review of arbitral decisions should be limited. No court has held – and Petitioner does not suggest – that arbitral decisions of statutory claims are subject to plenary review. *McMahon* and *Gilmer* expressly recognize that judi-

cial review "is limited," but nonetheless "sufficient to ensure" arbitral compliance with statutory mandates. Similarly, the D.C. Circuit in *Cole* said only that review should "ensure that arbitrators have properly interpreted and applied statutory law." 105 F.3d at 1487. And the Fifth Circuit in *Williams v. Cigna Financial Advisors Inc.*, 197 F.3d 752 (5th Cir. 1999), held only that review "'must be sufficient to ensure that arbitrators comply with the requirements of the statute' at issue." *Id.* at 761.

Hall Street is not to the contrary. *Hall Street* – which did not involve statutory claims and never cites *Gilmer* or *McMahon* – holds that the Federal Arbitration Act did not permit plenary review of arbitral awards, noting the "need[] to maintain arbitration's essential virtue of resolving disputes straightaway." 128 S. Ct. at 1405. *Hall Street* expresses concern regarding the potential of "open[ing] the door to . . . full-bore legal and evidentiary appeals" (*id.*) and rejects the argument that the FAA allowed "evidentiary and legal review generally" (*id.* at 1404). Since *McMahon* and *Gilmer* do not contemplate plenary review – or anything close to it – they are fully consistent with *Hall Street* and the nature of arbitration.

C. There Is A Clear Circuit Split On The Issue Presented By The Petition.

As the Petition explains, there is a clear circuit split regarding the standard of review applicable to arbitral interpretation and application of federal statutes. The D.C. Circuit and the Fifth Circuit have held that *McMahon* and *Gilmer* require heightened review of arbitral interpretation and application of federal statutes, while the Second, Fourth and Eleventh Circuits have held that the courts have virtu-

ally no ability to correct such critical arbitral errors. Pet. 18-25.

Respondents deny the existence of a "genuine" circuit split, claiming that the D.C. and Fifth Circuits did not really adopt a heightened standard of review for arbitral interpretations and applications of federal statutes. To support this assertion, Respondents cite later cases from these circuits applying a deferential standard of review in cases reviewing arbitral awards under federal statutes. Opp. 20-26. Respondents are patently wrong.

Any fair reading of the D.C. Circuit's decision in *Cole* and the Fifth Circuit's decision in *Williams* demonstrates that both courts expressly adopted a heightened standard of review for arbitral interpretations and applications of federal statutes – both courts said they were doing so, and explained that this heightened standard was required by *McMahon* and *Gilmer*. *Cole*, 105 F.3d at 1487; *Williams*, 197 F.3d at 760-762. Significantly, both *Cole* and *Williams* adopted standards for reviewing arbitral interpretations and applications of federal statutes that permitted vacatur regardless of whether the arbitrators' misapplication of the statute was intentional. 105 F.3d at 1487; 197 F.3d at 761-762. This placed the D.C. and Fifth Circuits in direct conflict with the Second, Fourth and Eleventh Circuits, which require intentional error to justify vacatur. Pet. 19-22. This is no mere "semantic difference" – one standard permits correction of error and the other does not.

Respondents are similarly misguided in asserting that later cases in the D.C. and Fifth Circuits undermined this conflict by applying the normal deferential standard of review to arbitral awards under

federal statutes. Opp. 22-26. In fact, the cases they cite *did not involve challenges to the arbitrators' interpretation or application of the statutes.*[2] Since *Cole* and *Williams* limited heightened review to arbitrators' interpretation and application of the statute, these later cases properly applied the deferential standard of review to challenges on other grounds. Therefore, these later cases do not detract from the circuit split illustrated by *Cole* and *Williams*.

D. Proper Resolution Of The Issue Presented Affects The Result In This Case.

This case provides an ideal vehicle for resolution of the issue presented because the result would be different if the proper standard were applied. Pet. 26-32. Respondents argue that the result would be the same, claiming that (1) the arbitrator's decision was "fact- and document-specific," (2) the FLSA's written consent requirement is merely "procedural," and therefore inapplicable in arbitration, and (3) all of the parties' rights are adequately protected by disregarding the congressionally-mandated written consent requirement. Opp. 28-38. These arguments are erroneous.

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[2] Although the cases cited by Respondents involved federal statutory claims, none of them involved challenges to the arbitrators' interpretation or application of the statute. *See La-Prade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 705-706 (D.C. Cir. 2001) (discretionary imposition of a portion of forum costs on partially successful plaintiff); *Kurke v. Oscar Gruss & Son, Inc.*, 454 F.3d 350, 355 (D.C. Cir. 2006) (rejection of defenses of ratification and failure to mitigate damages); *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 352-356 (5th Cir. 2004) (interpretation of scope of arbitration clause and determination of conflict of interest).

1. The critical questions posed by the petition are not "fact- and document-specific."

Respondents contend that resolution of the issue presented by the Petition would not change the result in this case because the arbitrator based his ruling upon an interpretation of the parties' arbitration agreement and the procedural history of the case. Opp. 28-32. Not so.

The *only* language the arbitrator "interpreted" to reach his desired result was the parties' agreement to arbitrate before the AAA. Based on this agreement to arbitrate, the arbitrator concluded that the AAA class arbitration rules trumped the congressionally-mandated written consent requirement of § 16(b). Pet. App. 31a-35a. That does not make the arbitrator's decision "document-specific," since it would apply to every agreement to arbitrate before the AAA.

Moreover, the arbitrator's reliance upon the "procedural history" of this case also presents a pure issue of law, which would be resolved by the Court's decision. The arbitrator decided that Petitioner's enforcement of an arbitration agreement in a different case[3] made it "equitable" to disregard § 16(b) and

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[3] In *Johnson v. Long John Silver's Restaurants, Inc.*, 320 F. Supp. 2d 656 (M.D. Tenn. 2004), *aff'd* 414 F.3d 583 (6th Cir. 2005), a plaintiff instituted an FLSA collective action against Petitioner. The district court granted Petitioner's motion to compel arbitration, and the Sixth Circuit affirmed. The arbitrator in this case decided that "equity is better served" by certifying an opt-out class because potential plaintiffs might have obtained relief in the *Johnson* case if Petitioner had not successfully compelled arbitration. Pet. App. 36a.

certify an opt-out class. Pet. App. 33a-36a. This issue is not "fact-specific" because the question is not whether the arbitrator's result was "equitable," but whether an arbitrator (or a court) may disregard the unequivocal written consent requirement of § 16(b) whenever it decides that an opt-out class would be more "equitable" than the congressionally-mandated written consent requirement. Neither the arbitrator nor Respondents provide any support for this peculiar notion.

2. It is irrelevant whether the written consent mandate is characterized as "substantive" or "procedural."

Respondents also assert that the written consent requirement of § 16(b) is merely "procedural" and therefore inapplicable in arbitration. Opp. 32-36. This assertion does not argue against certiorari.

The relevant question is not whether the written consent requirement is "procedural" or "substantive," but whether it must be applied in arbitration because it is an integral part of the entire statutory scheme, representing a critical congressional policy choice. Respondents do not address that issue.

Respondents never deny that Congress' decision to adopt the written consent requirement reflected a conscious public policy choice (Pet. 27-30), and constitutes a "crucial policy decision." *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 311 (3d Cir. 2003). Even the Fourth Circuit in this case acknowledged that Congress intended that the written consent requirement would apply in arbitration. Pet. App. 11a. Respondents also do not deny that the written consent requirement is such an integral part of the statutory scheme that it is impossible to apply the

FLSA's statute of limitations without applying the written consent requirement. Pet. 30-31.[4]

Even if the issue is whether the written consent requirement is "procedural" or "substantive," the proper conclusion is that the requirement is substantive for the reasons specified by the Secretary of Labor in her *amicus* brief, *i.e.*, the written consent requirement recognizes an employee's "fundamental right not to be included as a plaintiff" without his or her consent. CA JA 213.

3. Certification of an opt-out class does not "effectively vindicate" the parties' rights.

Respondents' final argument is that the arbitrator's certification of an opt-out class "effectively vindicated" the parties' rights under the written consent mandate of § 16(b), because the arbitrator directed that the class members be given the "best notice practicable under the circumstances." Opp. 36-38. This bizarre contention warrants little response. Obviously, the written consent requirement mandated by Congress – a requirement representing a critical policy choice – is not "effectively vindicated" by an order that completely eliminates that requirement.

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[4] Respondents concede that "there is certainly a connection" between the FLSA statute of limitations and the written consent mandate, but argue that the statute of limitations was tolled in this case. Opp. 35-36. That misses the point. Petitioner's argument is that the written consent requirement is an integral part of the statutory scheme and therefore must be applied in arbitration. That is true whether or not the statute of limitations might be tolled in a particular case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PETER J. GREGORA
LAURA W. BRILL
Irell & Manella LLP
1800 Avenue of the Stars
Los Angeles, CA 90067
(310) 277-1010

HENRY L. PARR, JR.
DAVID H. KOYSZA
Wyche, Burgess, Freeman and Parham, P.A.
Post Office Box 728
Greenville, S.C. 29602
(864) 242-8200

DAN HIMMELFARB
Counsel of Record
ROBERT P. DAVIS
TAMARA S. KILLION
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

SEPTEMBER 2008